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**In the Supreme Court of the United States**

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,  
PETITIONERS

v.

HERMAN DELGADO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

REX E. LEE

*Solicitor General*

D. LOWELL JENSEN

*Assistant Attorney General*

ANDREW L. FREY

*Deputy Solicitor General*

ALAN I. HOROWITZ

*Assistant to the Solicitor General*

PATTY MERKAMP STEMLER

*Attorney*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

### QUESTION PRESENTED

Whether INS agents violate the Fourth Amendment when, possessing probable cause to believe that a number of employees at a factory are illegal aliens, they conduct a survey of the factory's employees by stationing agents at the factory exits and walking through the factory addressing brief inquiries to individual employees suspected of being aliens regarding their citizenship or resident alien status.

### PARTIES TO THE PROCEEDING

Joseph Sureck, William French Smith, Leonel J. Castillo (now replaced as Commissioner of INS by Alan C. Nelson), Gil Clarin, and James Robinson were appellees below in their official capacities and are also petitioners here. Herman Delgado, Ramona Correa, Francis Labonte, and Maria Miramontes were appellants below and are respondents here. The International Ladies' Garment Workers' Union, AFL-CIO (ILGWU) was originally a plaintiff in the district court, but the court ordered it dismissed as a party (App. G, *infra*, 59a-61a). ILGWU appealed from the dismissal order, and thus, while the court of appeals did not rule on that portion of the appeal (App. A, *infra*, 43a n.24), ILGWU is nominally a respondent here.



## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statute involved .....	2
Statement .....	2
Reasons for granting the petition .....	11
Conclusion .....	22
Appendix A .....	1a
Appendix B .....	44a
Appendix C .....	45a
Appendix D .....	49a
Appendix E .....	53a
Appendix F .....	56a
Appendix G .....	58a
Appendix H .....	61a

## TABLE OF AUTHORITIES

### Cases:

<i>Almeida-Sanchez v. United States</i> , 413 U.S. 266 .....	18, 21
<i>Au Yi Lau v. INS</i> , 445 F.2d 217, cert. denied, 404 U.S. 864 .....	17, 18
<i>Babula v. INS</i> , 665 F.2d 293 .....	10, 21
<i>Blackie's House of Beef, Inc. v. Castillo</i> , 659 F.2d 1211, cert. denied, 455 U.S. 940 .....	21
<i>Camara v. Municipal Court</i> , 387 U.S. 523 .....	20
<i>Delaware v. Prouse</i> , 440 U.S. 648 .....	16
<i>Dunaway v. New York</i> , 442 U.S. 200 .....	9
<i>Illinois Migrant Council v. Pilliod</i> , 531 F. Supp. 1011, appeal pending, Nos. 82-1870, 82-1871 (7th Cir.) .....	9

## (IV)

Cases—Continued:	Page
<i>Illinois Migrant Council v. Pilliod</i> , 548 F.2d 715 .....	18
<i>Lee v. INS</i> , 590 F.2d 497 .....	17, 18
<i>Terry v. Ohio</i> , 392 U.S. 1 .....	13, 17
<i>United States v. Anderson</i> , 663 F.2d 934 ..	9
<i>United States v. Biswell</i> , 406 U.S. 311 ....	20
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873 .....	16, 18, 19, 21
<i>United States v. Caceres</i> , 440 U.S. 741 ....	19
<i>United States v. Martinez</i> , 507 F.2d 58 ....	18
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 .....	8, 10, 14, 16, 19, 20
<i>United States v. Mendenhall</i> , 446 U.S. 544 .....	13
Constitution and statutes:	
United States Constitution:	
Fourth Amendment .....	<i>passim</i>
Fifth Amendment .....	7
8 U.S.C. 1304(e) .....	19
8 U.S.C. 1357(a) .....	2
8 U.S.C. 1357(a)(1) .....	8, 10, 17, 18, 19
28 U.S.C. 1252 .....	18
Miscellaneous:	
Immigration and Naturalization Service, U.S. Dep't of Justice, Pub. No. M-69, <i>The Law of Search and Seizure for Immigra- tion Officers</i> (Rev. June 1979) .....	4

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The Solicitor General, on behalf of the Immigration and Naturalization Service and other petitioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-43a) is reported at 681 F.2d 624. The opinions of the district court (Apps. C-G, *infra*, 45a-60a) are not reported.

### JURISDICTION

The judgment of the court of appeals (App. H, *infra*, 61a) was entered on July 15, 1982. A petition for rehearing was denied on September 30, 1982 (App. B, *infra*, 44a). On December 20, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

8 U.S.C. 1357(a) provides in pertinent part:

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; \* \* \*

## STATEMENT

Respondents filed two different actions, which were subsequently consolidated, in the United States District Court for the Central District of California seeking declaratory and injunctive relief against the Immigration and Naturalization Service's (INS) practice of conducting factory surveys for the purpose of locating illegal aliens. Respondents' primary contention was that these surveys violated the Fourth Amendment. The district court entered summary judgment on behalf of the INS (App. C, *infra*, 48a). The court of appeals reversed and remanded (App. A, *infra*, 1a-43a).

1. The specific factual context underlying this case consists of three factory surveys conducted by the INS in two garment factories in 1977. The record contains affidavits by government officials relating to the manner of conducting these and other factory surveys, together with depositions of the individual respondents describing the surveys. As the court of appeals found (App. A, *infra*, 8a), the material facts are not seriously in dispute.

a. In both January and September 1977, the INS obtained search warrants authorizing its officers to search the Southern California Davis Pleating Company (Davis Pleating) for illegal aliens. The warrants did not identify any particular illegal aliens by name. Rather, the warrants were based on reliable information showing that Davis Pleating employed illegal aliens; they au-

thorized the INS to search the factory for such persons (App. A, *infra*, 5a & n.5).<sup>1</sup> Pursuant to these warrants, INS officers arrested 78 illegal aliens from among approximately three hundred employees present at Davis Pleating in January 1977. In September 1977, the INS arrested 39 illegal aliens out of a work force of approximately two hundred employees. App. A, *infra*, 4a; 1/17/80 Affidavit of Philip Smith, Exhibit G to Memorandum in Support of Defendants' Motion for Summary Judgment, filed 1/18/80. In October 1977, the INS conducted a survey of the work force at Mr. Pleat, another garment factory. This survey also was conducted because the INS had received information establishing that Mr. Pleat employed illegal aliens. On this occasion, however, the INS agents entered with the consent of Mr. Pleat's owner, rather than pursuant to a warrant. This survey resulted in the apprehension of 45 illegal aliens out of a work force of approximately ninety employees. *Ibid.*

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<sup>1</sup> The affidavit submitted in support of the January warrant stated that INS investigator Gail Richard Kee had conducted surveillance outside the Davis Pleating factory and had stopped three illegal aliens entering the factory. Each of the three women, who were named in the affidavit, informed Investigator Kee that Davis Pleating employed many illegal aliens of Latin extraction.

The September warrant was issued on information volunteered by Rachel Mata, an employee at Davis Pleating who was displeased with the company's hiring of illegal aliens. Mata reported to the INS that two illegal aliens deported following the January survey had returned to the United States and resumed their positions at Davis Pleating. She further stated that many other employees boasted that they had no immigration documents. She also reported that Davis Pleating had recently hired about one hundred employees and that most of them appeared to be illegal aliens. Information was also supplied to the INS by an illegal alien who worked at Davis Pleating. She maintained that four of her coworkers were also illegal aliens.

The factory surveys at both Davis Pleating and Mr. Pleat were conducted in accordance with standard INS procedures established on a nationwide basis. See generally 11/15/79 Declaration of Philip Smith; Affidavit of Philip Smith, Exhibit B to Memorandum in Support of Defendant's Motion to Dismiss, filed 6/30/78; Affidavit of Gail Richard Kee, Exhibit C; Affidavit of Joseph Sureck, Exhibit A. A team of plainclothes INS agents entered the factory to question the employees while other agents stationed themselves at the doors to prevent suspected illegal aliens from escaping.<sup>2</sup> The agents, who did not display any weapons, wore INS badges, identified themselves, and announced their purpose. The officers walked slowly through the factory asking between one and three questions of employees whom they had reason to believe were aliens.<sup>3</sup> General-

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<sup>2</sup> As the record demonstrates (see Delgado Dep. 84-85; Labonte Dep. 34-36), the agents at the exits do not prevent employees from exiting the factory. They are stationed at the exits so that they can observe persons who exit or attempt to exit, question as to their citizenship status those persons they believe to be aliens, and arrest those persons whom they have probable cause to believe are aliens illegally in the United States.

<sup>3</sup> The court of appeals stated (App. A, *infra*, 4a) that INS agents are instructed to question each worker as to his citizenship status, but the record demonstrates that this statement is erroneous. As a matter of policy, the INS instructs its agents to question only those persons whom they reasonably suspect of being aliens. See Immigration and Naturalization Service, U.S. Dep't of Justice, Pub. No. M-69, *The Law of Search and Seizure for Immigration Officers* (Rev. June 1979), excerpted at Exhibit H to Memorandum in Support of Defendant's Motion for Summary Judgment, filed 1/18/80. The record, including the depositions of the respondents, confirms that the agents did not question all employees. 11/15/79 Declaration of Philip Smith, at 2; Delgado Dep. 52; Correa Dep. 54-56, 66. In addition, the agents may inquire of employees who are not suspected of being aliens as to whether they know of other employees who are illegal aliens or who have concealed themselves from the agents.

ly, the first question pertained to place of birth or citizenship status. If the individual replied that he was born in the United States or that he was a citizen, usually no further questions were asked. If the response gave the agent reason to believe that the individual was an alien, the agent would ask the basis for the alien's presence in the United States<sup>4</sup> and would ask to see the alien's immigration papers. See, *e.g.*, Delgado Dep. 45-55, 80-81; Labonte Dep. 25; Correa Dep. 48-55, 69; Miramontes Dep. 26-29. Throughout the surveys, the agents used no force. The employees were free to walk around within the factory and to continue with their work. Generally, upon the arrival of the INS agents, some employees would attempt to flee or hide. The agents did not chase these employees, but rather continued their survey until they reached the hiding place of the illegal aliens. See, *e.g.*, Delgado Dep. 40-46, 61-66, 70, 77.

b. The respondents are four employees who were present during the surveys at their work place. None of the respondents was arrested. Respondent Delgado is employed by Davis Pleating and is a citizen born in Mayaguez, Puerto Rico (Delgado Dep. 4-5). During the January survey, he was not questioned by the INS agents regarding his citizenship or immigration status, although he was asked by one agent if he had a key for the back door (*id.* at 52, 59-60). Delgado walked freely throughout the factory during the survey, which lasted between one and one and a half hours (*id.* at 50, 60-61). During the September survey, Delgado again was al-

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Affidavit of Philip Smith, Exhibit B, *supra*, at 4. INS agents are also instructed not to detain individuals except on a reasonable suspicion that they are illegally present in this country. See M-69, *supra*.

<sup>4</sup> For example, the employee might be present in the United States as a permanent resident alien or here on a temporary basis with a valid work permit.



lowed to walk throughout the factory (*id.* at 77-79). On this occasion an INS agent asked Delgado where he was born. When Delgado responded that he was born in Mayaguez, Puerto Rico, the agent moved on to another worker (*id.* at 79-81). While the survey was being conducted, Delgado left the factory building to load a truck. He was neither stopped nor questioned by the INS agent stationed at that door (*id.* at 84-85).

Respondent Correa also worked at Davis Pleating. She is a United States citizen who was born and has always resided in Southern California (Correa Dep. 5, 8). During the surveys, she was permitted to walk through the factory without interference from the immigration officers (*id.* at 61-66). She was asked no questions during the January survey (*id.* at 56). In September, however, an agent asked Correa, as she was walking through the factory, where she was born. After responding that she was born in California, Correa continued on her way without further questioning (*id.* at 69).

Respondent Labonte also worked at Davis Pleating. She is a resident alien who was born in Mexico (Labonte Dep. 5-8). During the September survey she was seated in front of a machine when an agent tapped her on the shoulder and asked to see her immigration papers. She displayed her papers and was not questioned further (*id.* at 37-40). At one point, Labonte exited the factory, approached some INS officers outside the building, and asked them why they were taking the illegal aliens away (*id.* at 31, 34-36, 49-50).

Respondent Miramontes, a resident alien, worked at Mr. Pleat (Miramontes Dep. 6). When the October survey began, Miramontes was walking to her work station from an office when an INS agent asked her if she was a citizen. When she responded that she was not, he asked to see her papers. Miramontes showed her papers, and the agent continued on his way (*id.* at 18-20).

Miramontes had no other contact with the agents (*id.* at 46).

2. Respondents filed two different actions seeking a declaration that INS factory surveys violate the Fourth Amendment and asking that INS be enjoined permanently from conducting them.<sup>5</sup> In particular, respondents challenged the constitutionality of an INS entry into a factory without the consent of the employees or a warrant specifically naming the individuals to be questioned. The second complaint was filed as a class action on behalf of the respondents and all persons of Latin ancestry employed in the garment industry or any other industry in the Central District of California. Complaint, para. 12. The International Ladies' Garment Workers' Union (ILGWU) was also named as a plaintiff in both complaints. The district court denied respondents' motion to certify the class and also dismissed the ILGWU as a party for lack of standing. See App. A, *infra*, 6a; App. G, *infra*, 58a-60a. Thereafter, the district court granted the INS's motion for partial summary judgment, holding that the owner of a workplace may give a valid consent to entry by the INS and that a warrant authorizing such an entry need not identify each person to be contacted by the INS (Apps. E & F, *infra*, 53a-57a). Subsequently, the court entered supplemental findings of fact and conclusions of law, holding, *inter alia*, that the two warrants issued to search for illegal aliens at Davis Pleating were valid and were based upon probable cause (App. D, *infra*, 49a-52a).

On a second motion for summary judgment, the district court considered the Fourth Amendment implications of the manner in which the factory surveys were conducted. The court denied respondents' request for

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<sup>5</sup> The complaint also asserted that the surveys violate the equal protection component of the Fifth Amendment, but the courts below did not reach this issue. See App. A, *infra*, 7a n.7.

an order enjoining the INS from “interrogating or otherwise interfering [*sic*] with the rights” of the respondents without an arrest or search warrant naming the respondents or “reasonable suspicion based on specific, irrefutable facts that [they] are aliens unlawfully in the United States” (App. C, *infra*, 46a). The court found that none of the respondents had been arrested or detained and that the INS agents were entitled to pose questions to anyone if they did not detain the person. Alternatively, relying on *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the court held that, even if respondents technically “had experienced some form of seizure by placement of INS investigators at the factory exits, the degree of intrusion on [respondents] was so minimal that there was no violation of the Fourth Amendment” (App. C, *infra*, 47a). The court also concluded that, under 8 U.S.C. 1357(a)(1), any person believed to be an alien may be questioned about his right to be in the United States. In sum, the court found that respondents’ Fourth Amendment rights had not been violated in the course of the factory surveys, and it granted the INS’s motion for summary judgment (App. C, *infra*, 45a-48a).

3. The court of appeals reversed (App. A, *infra*, 1a-43a). The court held that the method of executing the factory surveys by stationing agents at the exits to prevent illegal aliens from escaping violated the Fourth Amendment in that it constituted a seizure of the entire work force.<sup>6</sup> The court concluded that such a seizure was illegal in the absence of a “reasonable, individualized suspicion of illegal alienage of each detained worker prior to the execution of the surveys” (*id.* at 40a).

<sup>6</sup> The court upheld the district court’s denial of class certification (App. A, *infra*, 43a n.24). It did not reach the question whether the district court correctly dismissed the ILGWU as a party (*ibid.*), and it did not address the validity of the search warrants (*id.* at 9a).

The court first held, relying heavily on *Illinois Migrant Council v. Pilliod*, 531 F. Supp. 1011 (N.D. Ill. 1982), appeal pending, Nos. 82-1870, 82-1871 (7th Cir.), that the stationing of agents at the exits "sufficiently intrudes upon the privacy and security interests of the workers that a seizure of the workforce occurs during the surveys" (App. A, *infra*, 12a). The court acknowledged that the respondents "had varying degrees of freedom to circulate through or exit the factories" (*id.* at 19a), but nonetheless held that the work force was seized for the entire duration of the survey. The court stated that the number of INS agents and their display of INS badges "represented a threatening presence of INS agents to the reasonable worker" (*ibid.*). Moreover, the stationing of agents at the exits "indicated to the entire workforce that departures were not to be contemplated" (*ibid.*). Quoting *United States v. Anderson*, 663 F.2d 934, 939 (9th Cir. 1981), the court concluded that "even before individual questioning began, a reasonable worker 'would have believed that he was not free to leave'"; and hence, the entire work force was seized within the meaning of the Fourth Amendment (*id.* at 20a).<sup>7</sup>

The court of appeals then held that the Fourth Amendment permits the INS to engage in detentive questioning only on the basis of an individualized suspicion that a worker is an alien *illegally* in this country (App. A, *infra*, 20a-39a). The court first concluded that the Fourth Amendment generally requires a suspicion

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<sup>7</sup> In this connection, the court rejected respondents' contention that, under *Dunaway v. New York*, 442 U.S. 200 (1979), the manner in which the factory surveys were conducted constituted an arrest of the work force requiring probable cause (App. A, *infra*, 11a-12a). To the contrary, the court specifically found that no one was arrested "until the investigators had sufficient probable cause to suspect that those in custody were in this country without proper documentation" (*id.* at 12a).

of illegality to support a detention and held that the same requirement applies here (*id.* at 30a-32a). The court recognized that 8 U.S.C. 1357(a)(1) expressly authorizes INS agents "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," but it construed that provision not as a grant of authority but as a "statutory limitation upon the conduct of INS agents" with respect to their right to engage in non-detentive questioning of an individual (App. A, *infra*, 24a). Thus, the court held that Section 1357(a)(1) imposes a restriction under which INS agents may pose questions only to persons whom they reasonably suspect of being aliens and, moreover, that any questioning that constitutes a seizure under the Fourth Amendment may be conducted only when an agent reasonably suspects that the individual being questioned is an alien illegally present in this country. A different rule, the court concluded, "would grant the INS impermissible discretion to detain and question at whim" (App. A, *infra*, 32a).

The court of appeals further held that any detentive questioning of an alien had to be based on an *individualized* suspicion of illegal alienage (App. A, *infra*, 32a-39a). The court acknowledged that this Court in *United States v. Martinez-Fuerte*, *supra*, had recognized that a seizure within the meaning of the Fourth Amendment could be effected in some circumstances in the absence of an individualized suspicion of illegality, but the court distinguished *Martinez-Fuerte* on the ground that it entailed a lesser intrusion than the factory surveys involved here (*id.* at 32a-35a). Thus, the court held that reasonable suspicion or even probable cause to believe that numerous illegal aliens were working in the factories was insufficient to justify the seizure of any individual alien; in this connection, the court explicitly rejected the Third Circuit's contrary holding in *Babula v. INS*, 665 F.2d 293 (1981) (App. A,

*infra*, 35a-39a). Applying these principles to the instant case, the court held that the surveys violated the Fourth Amendment because the entire work force was seized and the INS agents did not have an individualized suspicion that each employee was an illegal alien (*id.* at 39a-42a).

### REASONS FOR GRANTING THE PETITION

The court of appeals' decision, if allowed to stand, will have far-reaching practical and legal consequences. First, it will have a direct and significant adverse effect on the ability of the INS to enforce the immigration laws. Beyond that, the decision below incorrectly resolves important Fourth Amendment questions that have broad significance outside the particular context of this case.

From a practical standpoint, the court of appeals' decision almost completely destroys the utility of an important and effective tool in apprehending aliens who are illegally present in this country. Because of the concentration of illegal aliens at certain places of employment and the INS's limited manpower, a survey of employees at a factory at which the INS has reason to believe numerous illegal aliens are employed is one of the INS's most effective enforcement techniques. See Affidavit of Philip Smith, Exhibit B, *supra*, at 1. In 1977, the year in which the surveys at issue here took place, more than 20,000 illegal aliens were identified and arrested in the course of factory surveys in the Los Angeles area alone. 11/15/79 Declaration of Philip Smith, at 2.

The decision below severely undercuts the effectiveness of such surveys. It quite plainly bars under any circumstances the stationing of agents at exits to prevent illegal aliens from fleeing during a factory survey. Under the reasoning of the court of appeals, even if INS agents have probable cause to believe that 99 out of 100 persons present in a factory are illegal aliens,



agents cannot be stationed at the exits because that would constitute an illegal seizure of the one person inside who is not an illegal alien.<sup>8</sup> Clearly, the effectiveness of factory surveys will be greatly diminished, if not totally destroyed, if the INS is not permitted to station agents at the doors of a factory to prevent escape while the survey is being conducted. Indeed, the court of appeals itself recognized that its decision barring the stationing of agents at the exits would reduce substantially the number of illegal aliens apprehended and hence hinder INS enforcement efforts (App. A, *infra*, 16a, 42a). Moreover, to the extent the INS is able to continue with such surveys at all in light of the court's opinion, the disorder and danger involved in conducting the surveys will be greatly increased because illegal aliens will be encouraged to flee by the absence of anyone guarding the exits.

From a legal standpoint, the potential precedential impact of the decision below on Fourth Amendment law is even greater. In the specific immigration context, the court of appeals' decision calls into question the constitutionality of a federal statute, and it expressly creates a conflict with a decision of another court of appeals with respect to the legality of established INS practices. More broadly, the decision casts doubt on the validity of longstanding police practices directed at apprehending criminals who have been able to mingle temporarily with innocent persons. The significant impact on Fourth Amendment law of the erroneous rulings of the court of appeals creates a compelling need for review by this Court.

1. The court of appeals seriously erred in holding that the stationing of agents at exits during a factory survey

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<sup>8</sup> Significantly, two of the three factory surveys underlying the present litigation were supported by a warrant based upon probable cause to believe that a number of the employees at the factory named in the warrant were illegal aliens.



constitutes an illegal seizure of the entire workforce. The court purportedly applied the test set forth by Justice Stewart in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (footnote omitted), that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." See App. A, *infra*, 12a-13a, 19a-20a; see also *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). However, it simply ignores the realities of the situation to hold that every worker in a factory is "seized" under this test as soon as INS agents commence a factory survey by taking up positions at the exits and before any questioning at all has occurred.

Preliminarily, we note that it is only in a theoretical sense that the work force here, or in any typical factory survey, can be characterized as having a "freedom to leave" that is restrained by the appearance of the INS. The factory surveys in this case were conducted during morning working hours (see Delgado Dep. 66; Correa Dep. 59; Labonte Dep. 17). At that time the employees surely were obligated to be present at their work stations performing their employment duties; quite apart from the appearance of the INS agents, the employees were not "free to leave" the factory in any real sense. Given the undisputed finding (see App. A, *infra*, 19a) that during the survey employees were free to walk through or exit the factory in the course of performing their duties, the court of appeals' opinion does not explain how the INS agents here restrained the "freedom to leave" of members of the work force in any meaningful sense.

More fundamentally, there is no basis for finding that employees who were not illegal aliens would have felt their freedom restrained by the stationing of agents at the exits. The purpose of the survey was manifest and was announced by the INS agents, namely, to appre-

hend illegal aliens. Hence, as respondent Correa candidly testified (Correa Dep. 76), a citizen or alien legally present in this country knew immediately that he or she personally had nothing to fear from the INS; such individuals could not reasonably have felt threatened or restrained by the survey. They reasonably should have understood that the INS agents at the exits were positioned to stop only illegal aliens from leaving, not to curtail the movements of others. Thus, contrary to the court of appeals' suggestion (App. A, *infra*, 11a), a citizen or legal alien should not have felt coerced if he saw workers arrested who were trying to flee.

Furthermore, even accepting the court of appeals' view that the stationing of agents at the exits is in some technical sense a seizure of the entire work force, including those employees who are not illegal aliens, the court of appeals nevertheless erred in finding that such precautionary action violates the Fourth Amendment. This Court has recognized that a limited intrusion that rises to the level of a Fourth Amendment "seizure" may in some circumstances be effected in the absence of an individualized basis for suspicion. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). There, the Court sanctioned the operation of a fixed checkpoint on a California highway that required all vehicles to come to a virtual halt as they passed by, even though the Court assumed that each car was thereby "seized" within the meaning of the Fourth Amendment. See *id.* at 546 n.1, 556. Moreover, the Court held that the Constitution permitted the selective referral of some vehicles to a secondary checkpoint for three to five minutes of questioning without an articulable basis for suspecting that the vehicle contained illegal aliens. *Id.* at 563-564. Just as in *Martinez-Fuerte*, the law enforcement interests that make it reasonable to station agents at factory exits during a survey outweigh the minimal intrusion occasioned thereby, and hence any theoretical

seizure of the entire work force does not violate the Fourth Amendment.

The court of appeals' effort to distinguish *Martinez-Fuerte* on the ground that it involves a lesser intrusion than a factory survey (App. A, *infra*, 32a-35a) cannot withstand analysis. To be sure, employees at a factory do not know in advance when their workplace is going to be surveyed, while a traveler familiar with the highway in *Martinez-Fuerte* would not have been surprised to come upon the checkpoint (although he could not have anticipated being selected for secondary referral). In the most significant respects, however, the alleged seizure involved in the factory survey is substantially less intrusive than the checkpoint stop in *Martinez-Fuerte*. First, the alleged seizure in connection with the factory survey is only theoretical; the workers are free to go about their business and, as a practical matter, they engage in the same activity that they would if the INS did not appear. By contrast, the traveler stopped at a checkpoint is truly "stopped" and is diverted completely for three to five minutes from what he would otherwise have been doing.<sup>9</sup> Furthermore, it is difficult to see how the factory survey could engender any anxiety in an individual who is legally in this country; because he is immediately aware that the purpose of the survey is to apprehend illegal aliens, he knows that he

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<sup>9</sup> The court of appeals sought to distinguish *Martinez-Fuerte* on the ground that it involved a detention of much shorter duration than that involved here (see App. A, *infra*, 34a). But the court's holding that each individual member of the work force is seized for one and one-half hours during a factory survey is manifestly erroneous. While the entire survey, during which the employees are free to continue to go about their work, may last that long, it is clear that, to the extent there is any detention at all, the maximum that any individual who wishes to leave is detained is the very short time needed for him to answer an agent's question regarding his citizenship status, after which he clearly is free to leave.

is not subject to arrest and at worst will be asked only to answer a question about his citizenship status or show proper documentation to the agents. At a checkpoint, however, an individual singled out for selective referral will be considerably more anxious because he will often not be aware of the reason he has been singled out, and hence the seizure is significantly more intrusive for him.

The error of the court of appeals' analysis is manifested by the broad and unacceptable implications of its holding. According to the decision below, if one or more criminal fugitives were to flee into a building that also contained innocent persons, the police would not be permitted to guard the exits of the building and briefly check everyone who exited because that would constitute an illegal seizure of the innocent occupants. Indeed, under the court of appeals' decision, it is difficult to discern the constitutional basis for a roadblock to catch a fleeing criminal or to check for safety violations, since innocent persons would surely be stopped. But see *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 560 n.14. This extraordinary expansion of the Fourth Amendment by the court of appeals merits this Court's review.

2. a. Following up its conclusion that the entire work force is seized when INS agents station themselves at the exits during a factory survey, the court of appeals issued two other important Fourth Amendment rulings that warrant review by this Court. First, the court answered in the negative the question reserved by this Court in *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 n.9 (1975)—whether an INS agent may stop an individual reasonably believed to be an alien when there is no specific reason to believe that he is illegally in this country. As the court of appeals noted (App. A, *infra*, 23a), the lower courts have struggled with this

issue and have reached somewhat divergent results. Compare *Lee v. INS*, 590 F.2d 497 (3d Cir. 1979), with *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971). Clarification of this area of the law by this Court would facilitate the consistent adjudication of immigration cases in the lower courts.

Moreover, the court of appeals' ruling casts serious doubt on the validity of a federal statute, 8 U.S.C. 1357(a)(1), which provides that INS agents are empowered without warrant "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States \* \* \*." By its terms, the statute plainly does not require any suspicion of illegality as a prerequisite to such interrogation. Although the court of appeals was of the view that the Constitution does not permit any seizure of a person on the basis of alienage alone without a suspicion of illegality (see App. A, *infra*, 31a-32a), the court did not expressly find Section 1357(a)(1) unconstitutional. Rather, it interpreted the statute as referring only to questioning that does not involve a seizure under the Fourth Amendment (App. A, *infra*, 24a).<sup>10</sup> Because nothing in the Constitution prevents a law enforcement officer from addressing questions to anyone on the street so long as no seizure occurs (see, *e.g.*, *Terry v. Ohio*, *supra*, 392 U.S. at 34 (White, J., concurring)), the court of appeals reached the surprising conclusion that Section

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<sup>10</sup> The court did not explain what sort of questioning it had in mind. Because of its holding here that the entire work force was seized before any questioning occurred, the court did not consider whether the questioning reflected in the record in and of itself necessarily involved a seizure. Given its expansive view of the kind of INS conduct that gives rise to a seizure (see App. A, *infra*, 18a), however, it seems clear that the class of questioning that the court would recognize as non-detentive is small indeed (see *id.* at 40a n.23).

1357(a)(1), under its interpretation, was a "statutory limitation" on INS authority (App. A, *infra*, 24a).

As a matter of statutory construction, this reading of Section 1357(a)(1) is, to put it mildly, difficult to justify. The use of the term "interrogate" hardly connotes an intent to limit the reach of the statute to non-detentive questioning. And it is incomprehensible why Congress should have wished to impose such a special limitation on INS authority when it was seeking to improve enforcement of the Nation's immigration laws. Thus, both this Court and the lower courts generally have understood Section 1357(a)(1) to cover questioning that constitutes a "seizure" within the meaning of the Fourth Amendment. See, e.g., *United States v. Brignoni-Ponce*, *supra*; *Lee v. INS*, *supra*, 590 F.2d at 500; *United States v. Martinez*, 507 F.2d 58, 61 (10th Cir. 1974). Therefore, the soundest reading of the decision below is that the court interpreted Section 1357(a)(1) in this fashion in order to save its constitutionality, reasoning that the common sense interpretation of the statute would violate the Fourth Amendment (see App. A, *infra*, 31a-32a). See also *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977) (en banc); *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971). This suggestion of the unconstitutionality of a federal statute warrants review by this Court. Cf. 28 U.S.C. 1252.<sup>11</sup>

We submit that the court's conclusion of unconstitutionality is flawed. The primary basis for the holding is the view that the Fourth Amendment absolutely prohibits effecting a seizure in the absence of a reasonable suspicion of illegality (see App. A, *infra*, 22a-31a). But

<sup>11</sup> In *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), this Court limited on constitutional grounds the authority to search granted by Section 1357. That decision in no way affected, however, the INS's authority to interrogate conferred by Section 1357(a)(1).



this analysis ignores this Court's admonition that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *Martinez-Fuerte*, *supra*, 428 U.S. at 561. In the immigration context, it is "reasonable" under the Fourth Amendment for a stop to be based on alienage, even in the absence of a suspicion of *illegal* alienage. By statute, Congress has conditioned each alien's privilege of residing or working in the United States on fulfillment of the obligation to carry at all times a registration card evidencing his right to be here. 8 U.S.C. 1304(e). Aliens who choose to work or reside here accept that obligation and, by the same token, the obligation to produce proper documentation when requested to do so by INS officials pursuant to 8 U.S.C. 1357(a)(1). See *Brignoni-Ponce*, *supra*, 422 U.S. at 884. If they were free to refuse such a request, the requirement to carry identification would be rendered virtually meaningless. Thus, it is reasonable under the Fourth Amendment for an INS agent briefly to detain an individual reasonably suspected of being an alien so long as the detention is limited to inquiring as to the alien's right to be present in the United States.<sup>12</sup>

b. Finally, the court of appeals held that the required suspicion of illegality must be individualized, *i.e.*, the INS agents' reasonable suspicion (or even probable cause to believe) that numerous factory employees

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<sup>12</sup> As noted above (note 2, *supra*), as a policy matter the INS has instructed its agents not to detain individuals for questioning except on a reasonable suspicion of illegal alienage. This policy reflects a recognition of the INS's manpower limitations and an attempt to formulate a uniform nationwide policy that comports with the Seventh Circuit's decision in *Illinois Migrant Council v. Pilliod*, *supra*. Contrary to the court of appeals' assertion (App. A, *infra*, 20a n.12), the policy does not constitute a "concession" that brief questioning of an alien amounting to a seizure within the meaning of the Fourth Amendment is prohibited in the absence of a suspicion of illegality. Cf. *United States v. Caceres*, 440 U.S. 741 (1979).



were illegal aliens did not justify the seizure of any particular employee. This holding creates a new Fourth Amendment requirement that will make it quite difficult for the INS to act on reliable information concerning concentrations of illegal aliens. The Fourth Amendment simply does not contain any such requirement of individualized suspicion. Obviously, in order to detain a single individual, a law enforcement officer must have reason to believe that that individual is engaged in illegal activity; but there is no reason why the basis for suspicion must be "individualized." Thus, for example, if an officer knows that seven out of ten persons are illegal aliens, the knowledge that three of the persons will turn out to be innocent does not alter the fact that, in the absence of any additional information dispelling the suspicion with respect to a particular individual, the officer has a reasonable suspicion of illegal alienage with respect to each person sufficient to justify an initial detention for purposes of inquiry.<sup>13</sup>

This principle has been recognized by this Court. The clearest example is in the context of administrative searches, where the Court has expressly stated that a warrant for an "area inspection" need not be based on specific information about any particular building. *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967); see also *United States v. Biswell*, 406 U.S. 311 (1972). In the immigration context, the right to stop a car at a fixed checkpoint does not rest on any individualized basis for suspicion of a particular car (see *Martinez Fuerte, supra*, 428 U.S. at 560-563); by the same token, the Court has not suggested that the INS may conduct a roving patrol stop only where it has reason to suspect

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<sup>13</sup> Of course, the reasonable suspicion standard recognizes that in some cases further inquiry will dispel the suspicion. Thus, as long as it is supported by reasonable suspicion at the time, a detention is consistent with the Fourth Amendment even though the suspicion later turns out to have been unfounded.

that *every* occupant of a car is an illegal alien or engaged in criminal activity (see *United States v. Brignoni-Ponce*, *supra*). See also *Almeida-Sanchez v. United States*, *supra*, 413 U.S. at 283-285 (Powell, J., concurring).

The court of appeals explicitly recognized (App. A, *infra*, 35a-39a) that its holding on this point placed it in conflict with the Third Circuit's decision in *Babula v. INS*, 665 F.2d 293 (1981). In that case, the court upheld a factory survey similar to the ones involved here. The court rejected the contention that the employees of the factory could not be "seized" for questioning concerning their citizenship status in the absence of an individualized basis for suspicion (*id.* at 296-297), holding that the suspicions based "on the milieu in which the workers were found" (*id.* at 296) provided an adequate basis for the detentions. The decision below is also fundamentally inconsistent with *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1982). In *Blackie's*, the court upheld the issuance of an administrative search warrant for a restaurant based on probable cause to believe that illegal aliens worked there, although the warrant did not particularly describe or name the illegal aliens sought. While the court was not presented with the precise question of the validity of a seizure without individualized suspicion, its opinion makes clear that it understood the INS to be empowered to question employees who appeared to be aliens on the basis of the same generalized suspicion that supported the warrant. 659 F.2d at 1225-1226. The need to resolve this conflict in the circuits also militates in favor of review by this Court of the decision below.

In sum, both the practical impact of the decision below as a whole and the erroneous resolution by the court of appeals of the discrete Fourth Amendment issues addressed warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE

*Solicitor General*

D. LOWELL JENSEN

*Assistant Attorney General*

ANDREW L. FREY

*Deputy Solicitor General*

ALAN I. HOROWITZ

*Assistant to the Solicitor General*

PATTY MERKAMP STEMLER

*Attorney*

JANUARY 1983

## APPENDIX A

INTERNATIONAL LADIES' GARMENT WORKERS' UNION,  
AFL-CIO; HERMAN DELGADO; RAMONA CORREA;  
FRANCIS LABONTE; AND MARIA MIRAMONTES, ON  
BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY  
SITUATED, PLAINTIFFS-APPELLANTS,

v.

JOSEPH SURECK; WILLIAM FRENCH SMITH; \* LEONEL  
J. CASTILLO; AND THE IMMIGRATION AND  
NATURALIZATION SERVICE, DEFENDANTS-APPELLEES.

THE INTERNATIONAL LADIES' GARMENT WORKERS'  
UNION, AFL-CIO; HERMAN DELGADO; RAMONA  
CORREA; FRANCIS LABONTE AND MARIA  
MIRAMONTES, ON BEHALF OF THEMSELVES AND ALL  
PERSONS SIMILARLY SITUATED,  
PLAINTIFFS-APPELLANTS,

v.

JOSEPH SURECK; GIL CLARIN; JAMES ROBINSON,  
WILLIAM FRENCH SMITH; \* LEONEL J. CASTILLO; AND  
THE IMMIGRATION AND NATURALIZATION SERVICE,  
DEFENDANTS-APPELLEES.

Nos. 80-5054, 80-5153, 80-5035 and 80-5152.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 9, 1981.

Decided July 15, 1982.

On Appeal from the United States District Court for  
the Central District of California.

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\*Pursuant to Rule 43(c)(1) of the Federal Rules of Appellate Procedure, William French Smith has been substituted for Benjamin R. Civiletti as the defendant.

Before ANDERSON and NORRIS, Circuit Judges, and MUECKE, District Judge\*\*.

J. BLAINE ANDERSON, Circuit Judge:

This case presents another challenge to the methods used by the Immigration and Naturalization Service (INS) in its efforts to vigorously enforce the nation's immigration laws. Appellant International Ladies' Garment Workers' Union (ILGWU) and the named appellants appeal from district court rulings dismissing the ILGWU as a representational plaintiff, denying class certification, and denying two motions for summary judgment while granting cross motions for summary judgment in favor of the appellees (all referred to as "INS"). We reverse the summary judgment granted to the INS on the challenge to the detention and questioning.

### I. FACTS

Two actions, eventually consolidated, were filed in the district court requesting declaratory and injunctive relief from the INS' pattern and practice of conducting factory surveys or sweeps through factories and workplaces for purposes of locating illegal aliens.<sup>1</sup> Appellants challenge the INS activity as violative of the Fourth and Fifth Amendments.

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\*\*The Honorable C. A. Muecke, Chief Judge, United States District Court for the District of Arizona, sitting by designation.

<sup>1</sup> Throughout this opinion, the term "illegal alien" refers to aliens who have entered this country and/or are found to be in this country in violation of the laws of the United States. In this category are aliens who enter without inspection, aliens who overstay their non-immigrant visas and passes, and any others who enter or remain in the United States in violation of immigration and other laws. For most purposes, the term is synonymous with deportable alien. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 553, 96 S.Ct. 3074, 3080, 49 L.Ed.2d 1116 (1976).

The record demonstrates that at the time this litigation was initiated, the INS concentrated its Area Control operations<sup>2</sup> at workplaces rather than in residential areas because of the agency's limited resources and its experience in successfully apprehending large numbers of illegal aliens employed in various factories, most notably in the garment industry. The record also indicates that the Los Angeles District Office of the INS was conducting approximately four factory surveys per week and, on occasion, more than 100 illegal aliens were apprehended in a single factory as a result of surveys performed at various establishments.

The record also describes the typical factory survey as one commenced when the INS receives information, sometimes from anonymous sources, that a particular workplace may be employing illegal aliens. In order to verify this information, INS agents place the suspected workplace under visual surveillance in an effort to determine from observations of the workforce entering and leaving the workplace whether the company does indeed employ illegal aliens. If their information is verified, the agents are instructed to request permission of the workplace owner or management for the INS to enter and question suspected illegal aliens with the ultimate objective of arresting those found to be in the country illegally and referring them to appropriate deportation proceedings. The INS reports that approximately 90% of the owners and managers consent to the surveys of their workforce; the INS obtains search warrants to enter premises without such consent.

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<sup>2</sup> Record references to Area Control define it as operations which are designed to locate and apprehend aliens illegally in the United States. Declaration of Phillip Smith, Assistant Director for Investigations, Los Angeles District Office of the Immigration and Naturalization Service; Exhibit A, C.R. 97. Factory surveys apparently are considered to be a category of Area Control.

The record is free of disputed issues of material fact, although varying characterizations of the events surrounding the typical factory survey appear. After receiving consent or pursuant to warrant, INS agents enter the workplace by stationing agents at exits and entrances in order to prevent persons from leaving the workplace.<sup>3</sup> The remaining agents proceed through the factory, questioning workers as to their citizenship status. While the officers and agents are instructed to be courteous and cause as little disruption as possible, the survey process often begins with workers' cries of "la migra" (the immigration), followed by attempts by some workers to hide or run from INS officers conducting the survey. Disruption of the workplace usually occurs. The officers are instructed to question each worker, although the INS admits that such a task is not often possible.<sup>4</sup>

Three particular surveys are challenged in this case. Search warrants were issued for two surveys conducted at the Southern California Davis Pleating Company (Davis) workplace, the first conducted on January 4, 1977, where 78 illegal aliens were apprehended, and the other conducted on September 27, 1977, where 39 illegal aliens were apprehended. The third challenged survey occurred at a firm known as Mr. Pleat on October 3, 1977, where the INS entered by consent of the owner and where 45 illegal aliens out of workforce of approximately 90 were arrested. Appellants Delgado and Correa, United States citizens, and appellant Labonte, a resident alien, were all subjected to INS questioning at the Davis plant during the September survey. Appellant Miramontes, a resident alien, was asked three questions during the October survey of Mr. Pleat.

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<sup>3</sup> Affidavit of Phillip Smith; C.R. 14 at 3.

<sup>4</sup> *Id.*, at 4.



The search warrants for the Davis surveys were issued under Fed.R.Crim.P. 41 and did not state with particularity the names of any individual illegal aliens sought as the objects of the searches.<sup>5</sup> The INS entered the Mr. Pleat facility with the consent of the owner of the facility and not the consent of all of the workers. The record also indicates that during the Davis surveys, the INS agents did not question every worker as policy would usually dictate because manpower limita-

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<sup>5</sup> The search warrants issued for the January and September 1977 surveys of the Davis facility do not state that particular named persons were the objects of the surveys, but merely state that the INS investigator who executed the affidavit in support of the warrant had reason to believe that on the Davis premises:

"there is now being concealed certain property, namely persons, namely illegal aliens which are the fruits and instrumentalities and evidence of violations of Title 8, United States Code, Sections 1324 and 1325, ..."

E.R. at 110 and 413.

Both warrants were issued pursuant to information obtained by INS investigators through their surveillance of the Davis plant. The affidavit in support of the January 1977 survey did not list names of particular persons sought, but consisted of statements made by aliens apprehended while attempting to enter the Davis plant to the effect that they believed other illegal aliens were presently employed by Davis. In addition, the INS investigator affiant stated that he personally "noted that twenty persons of apparent Latin decent [sic] entered [the Davis premises] through the West door." E.R. at 113.

The affidavit in support of the September 1977 survey warrant contained information regarding an alleged complaint by one of the Davis citizen employees who said she could identify two named workers at Davis who had returned to work after having previously been deported as a result of the January survey. The same complainant suspected that many new hirees were illegal aliens "based on their behavior and comments." Finally, the affidavit stated that an illegal alien apprehended while approaching the outside of the Davis plant stated that she personally knew of four additional unnamed illegal aliens employed at the Davis plant.

tions prevented such a procedure in a factory employing 200-300 workers as did Davis at the time of the surveys. Instead, the workers chosen for questioning at the Davis surveys were selected with the agents' use of a combination of objective and subjective factors.<sup>6</sup>

As the labor organization certified as the exclusive representative of production and maintenance employees at the Davis and Mr. Pleat facilities, the ILGWU asserts its representational capacity to sue on behalf of its members under the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141, *et seq.* The ILGWU alleges that it represents thousands of garment workers, the majority of whom are of Latin ancestry employed in shops throughout the Central Judicial District of California. It alleges injury to itself and its members as a result of the INS factory surveys. Acting upon a motion filed by the INS, the district court ordered the Union dismissed from the litigation by an order filed on November 16, 1979, and entered as a final judgment under Fed.R.Civ.P. 54(b) on December 13, 1979. The Union appeals from this dismissal in Nos. 80-5035 and 80-5054.

The appellants' motion to certify a class consisting of "all persons of Latin ancestry or of a Spanish surname who are, will be, or have been employed in the garment industry or in any other industry in the Central Judicial District of California" was denied by Order entered May 31, 1979. Appellants appeal from this order in Nos. 80-5152 and 80-5153.

In December of 1979, the parties filed cross-motions for partial summary judgment on the issues of the con-

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<sup>6</sup> Some agents describe the selective process as one involving the use of factors which may indicate that a person is an alien; e.g., the person's clothing, facial appearance, hair coloring and styling, demeanor (i.e., anxiety or fright), language and accent, and a multitude of subjective factors that one agent described as "multisensory" factors.

stitutional validity of the search warrants and the validity of the surveys conducted with consent of only the owner of the Mr. Pleat workplace. On these issues, the district court found for the INS, holding the warrants valid as issued under Fed.R.Cr.Pro. 41(b)(4), containing sufficient particularity as to the persons to be seized and based upon sufficient probable cause. As an alternative holding, the district court found that the appellants lacked a sufficient privacy interest in their workplace to contest the surveys pursuant either to warrant or consent.

In January of 1980, the parties filed cross-motions for summary judgment on the remaining issues involving the propriety of the INS detention and questioning of workers during the surveys. On these issues, the district court again found for the INS, holding that the appellants were not arrested, detained or seized in a manner implicating the Fourth Amendment, that the INS properly conducted the questioning pursuant to statutory authority contained in 8 U.S.C. § 1357(a)(1), and that even if appellants had experienced some form of seizure by the placement of the INS investigators at factory exits, that the degree of intrusion was so limited that no Fourth Amendment violation existed.

The American Jewish Committee and the Mexican American Legal Defense and Educational Fund were granted leave to file an amicus curiae brief. The amici concentrate on alleged Fifth Amendment equal protection violations stemming from the surveys. The record contains no reference to district court action on the Fifth Amendment issues raised.<sup>7</sup>

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<sup>7</sup> Although the Fifth Amendment claim is mentioned in the First Amended Complaint in CV 78-0740-LEW (PX) (ER at 93), and in the Complaint in CV-78-324-LEW (PX), and is addressed briefly in Plaintiffs' Motion for Summary Judgment filed 1/18/80 (ER 655-57) (only three pages), the district court never addressed the Fifth Amendment issue in any of its orders, find-

## II. STANDARD OF REVIEW

This case appeared before the district court on two sets of cross-motions for summary judgment. In granting the motions in favor of the INS, the district court also adopted, with some changes, the prepared findings of fact and conclusions of law as submitted to the court by the INS. The most significant of the findings and conclusions were the district court's determinations that the plaintiffs did not have a legitimate privacy interest in the factory premises in order to contest the issuance of the search warrants, that none of the named plaintiffs had been arrested, detained or seized, and that the placing of INS agents at the exits of the factory during the operation did not rise to a level implicating Fourth Amendment constraints upon INS conduct.

Our review of summary judgment findings is *de novo*. This court will affirm a grant of summary judgment only if it appears from the record, after viewing all evidence and factual inferences in the light most favorable to the appellant, that there are no genuine issues of material fact and that the appellee is entitled to prevail as a matter of law. *Gaines v. Haughton*, 645 F.2d 761, 769 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 1006, 71 L.Ed.2d 297 (1982); *Heiniger v. City of Phoenix*, 625 F.2d 842, 843 (9th Cir. 1980). The appellants and appellees agree that none of the material facts are in dispute. The district court acknowledged this as well. Finding of Fact No. 5, filed February 15, 1980, and Finding of Fact IV, filed February 20, 1980. Additionally, we find no evidence in the record that the parties intended a trial on stipulated record which would suggest a clearly erroneous standard

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ings or conclusions, and the defendants/appellees never addressed it in their papers below. In view of our disposition, we need not reach these issues.

of review of the district court's findings. See *Starsky v. Williams*, 512 F.2d 109 (9th Cir. 1975). We will, therefore, consider this case to be governed by the standard of review of district court findings applicable to summary judgments, and will review the record with all reasonable evidentiary inferences granted in favor of the appellants.

### III. INS ENTRY WITH SEARCH WARRANT AND CONSENT

The searches at the Davis plant were conducted after the INS had procured search warrants issued by federal magistrates. Appellants assert that the warrants were defective because they were not supported with sufficient probable cause, were lacking in particularity since neither warrant listed the names or identity of particular aliens sought, and that Fed.R.Crim.P. 41 does not authorize the issuance of the type of warrant employed by the INS. We need not reach any of these questions because we are persuaded that the conduct of the INS during the factory surveys violated the Fourth Amendment rights of the factory workers.<sup>8</sup>

### IV. FOURTH AMENDMENT CONSIDERATIONS REGARDING DETENTIVE QUESTIONING

1. Execution of the Factory Surveys Constitutes a Seizure Cognizable under the Fourth Amendment.

We now turn to the issues raised by the appellants' challenges to the conduct of the INS upon entry into

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<sup>8</sup> In any event, the INS admitted during oral argument that reliance on the warrants was limited to justification for the initial entry into the workplaces. We therefore consider the detentive questioning of the workers to have been warrantless and do not pass judgment upon the propriety of the INS' use of such search warrants. Cf. *Blackie's House of Beef v. Castillo*, 659 F.2d 1211 (D.C.Cir. 1981), cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982).

the factories. A critical threshold issue here concerns the applicability of the Fourth Amendment to the INS questioning of workers during the factory surveys. The Fourth Amendment applies to law enforcement activities involving seizures of the person, including brief detentions short of a traditional arrest. *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981); *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *Reid v. Georgia*, 448 U.S. 438, 440, 100 S.Ct. 2752, 2753, 65 L.Ed.2d 890 (1980); *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975); *Terry v. Ohio*, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877-78, 20 L.Ed.2d 889 (1968).

The INS contends that the facts of this case do not present a detention or seizure which would implicate the objective standards required by the Fourth Amendment, relying primarily upon statements from *Terry v. Ohio*, *supra*; *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979); and *Cordon de Ruano v. INS*, 554 F.2d 944 (9th Cir. 1977). The INS argues that the test for a seizure is one requiring an analysis whether a reasonable, innocent person in the position of plaintiffs would feel free to leave. The INS answers that question, as applied to the facts of the present case, in the negative, contending that the four named plaintiffs circulated throughout the factories and could not reasonably feel detained by the appearance of INS investigators. The INS discounts the stationing of investigators at the exits of the factories by arguing that the plaintiffs complain only of a single encounter with INS investigators, who did not display a weapon or uniform, asking only one to three ques-

tions. These facts, the INS argues, constitute no Fourth Amendment seizure of the plaintiffs.

Appellants argue that the execution of the factory surveys involved a seizure in the nature of custodial detention requiring articulation of probable cause for the arrest of the workers, relying upon *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). In the alternative, the appellants contend that the factory surveys at least rose to the level of a seizure short of a traditional arrest, citing to *Brignoni-Ponce*, *supra*, and *Terry v. Ohio*, *supra*. Appellants maintain that the surveys are conducted with an exercise of physical force and a show of authority restraining the liberty of the workers. They point to the procedure whereby the exits to the factories are sealed off, while workers are immediately made aware of this action. They contend that the entry of the large number of agents into the workplace wearing badges and the common observation of immediate arrests of some workers who are seen attempting to flee increases the coercive impact of the operation. Appellants conclude that the plaintiffs are all made aware that for the duration of the survey, they are effectively detained in the custody of the INS agents performing the factory survey.

Initially, we would have to disagree with the appellants that a custodial detention of the sort observed in *Dunaway v. New York*, *supra*, is presented by the INS factory survey procedure. Although the appellants and other workers are surrounded by investigators placed at exits, and most workers are subjected to at least a visual perusal by investigators, if not actual questioning, the detentive nature of the factory survey, while intrusive, does not rise to the intrusive level of the traditional arrest found in *Dunaway*. *Dunaway* was escorted to police headquarters in a police vehicle and placed in an interrogation room although the officers did not have probable cause for his arrest. The Court



noted that even though Dunaway was not informed that he was under arrest at the time he was originally placed into the custody of the officers, the facts suggested that his detention rose to the level of a traditional arrest requiring the general standard of probable cause that Dunaway had committed the crime under investigation.

The facts of the present case do not suggest an arrest because the record indicates that none of the workers was handcuffed or placed into custody until the investigators had sufficient probable cause to suspect that those in custody were in this country without proper documentation. We therefore find *Dunaway* inapposite.

However, we must agree that the procedure used by the INS involves more than mere questioning or casual conversation as argued by the INS.<sup>9</sup> Our reading of the record in this case leads us to the conclusion that the execution of the factory surveys, while not rising to the level of an arrest requiring the general rule of probable cause, sufficiently intrudes upon the privacy and security interests of the workers that a seizure of the workforce occurs during the surveys.

This court's test to determine whether the factual circumstances of law enforcement activity rise to the level of a seizure under the Fourth Amendment is found in *United States v. Anderson*, 663 F.2d 934 (9th Cir. 1981):

"[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the

<sup>9</sup> The INS directs our attention to the oft-quoted statement in *Terry v. Ohio*: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." 392 U.S. at 19 n.16, 88 S.Ct. 1868 at 1879, 20 L.Ed.2d 889. The facts of this case suggest that questioning during the factory surveys was other than casual, personal intercourse between workers and INS investigators.

circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

*Id.* at 939, (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, at 1877, 64 L.Ed.2d 497 (1980) (opinion of Stewart, J.)). Although this court in *Anderson* noted that the above-quoted test was stated only in the plurality opinion of Justice Stewart in *Mendenhall* (joined only by Rehnquist, J.), the court proceeded to apply the test to the facts of *Anderson*, holding that a seizure was present in that case. 663 F.2d at 939-40. We will apply the above-quoted test to the facts of this case to determine whether the events taking place during the factory surveys at the Davis and Mr. Pleat factories rose to the level of a Fourth Amendment seizure.

Before applying the test, however, we must recognize that a federal district court has concluded that the "INS's policy of stationing agents at all exits during area control operations, in order to secure the premises and prevent persons whom the agents have probable cause or reasonable suspicion to believe are aliens from leaving the premises during the operation . . . results in 'seizures' for purposes of the fourth amendment." *Illinois Migrant Council v. Pilliod*, 531 F.Supp. 1011, 1018 (N.D.Ill. 1982), granting summary judgment and permanent injunction as to this issue on remand from *Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882 (N.D.Ill.1975), *aff'd.* 540 F.2d 1062 (7th Cir. 1976), *modified as to remedy*, 548 F.2d 715 (7th Cir. 1977) (en

banc).<sup>10</sup> The instant case contains evidence of similar INS policy of stationing agents at the factory exits and entrances for similar purposes. While speaking in general terms about the area control operations performed in the Los Angeles area, the Assistant District Director for Investigations at the Los Angeles office of the INS stated that "[o]fficers are usually stationed at various entrances and exits in order to guarantee that individuals will not escape." Affidavit of Philip Smith, at 3, attached as Exhibit B to Defendant's Memorandum in Support of Defendants' Motion to Dismiss, C.R. 14.

In *Pilliod*, the district court concluded that the "record reveals that the agents do in fact surround and detain all persons on the premises during control operations." 531 F.Supp. at 1018. That court also noted:

"The entire purpose of the policy of 'securing the premises' is to ensure that the agents 'control' the aliens during the course of the 'control operation.' The agents stationed at the exits are specifically instructed to prevent from leaving those individuals they suspect are aliens. The record reveals that the agents do in fact surround and detain all persons on the premises during control operations."

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<sup>10</sup> The district court also denied both parties' motions for summary judgment and sent to trial the issue of whether the INS policy of stopping and questioning during street encounters amounts to a seizure. The court granted the INS' motion for summary judgment on the issue of whether the INS should be enjoined from the use of "dragnet" search warrants since the INS had informed the court that the agency had abandoned its policy of obtaining such warrants. Finally, the district court refused to modify the preliminary injunction at the request of the INS in order to allow the INS to use civil administrative warrants based upon the D.C. Circuit's ruling in *Blackie's House of Beef v. Castillo*, 659 F.2d 1211 (D.C.Cir. 1981), cert. denied, — U.S. —, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982), stating that "[w]arrants to search premises simply do not authorize the seizure of persons found on the premises." *Pilliod*, 531 F.Supp. at 1020. See also, *id.*, at n.19.

*Id.* In response to INS arguments that the workers subjected to the area control operations voluntarily cooperated with the INS questioning and that the workers were never made aware of any limitation upon their movement by the presence of the agents stationed at the exits, the court in *Pilliod* remarked:

"Indeed, the entire notion of preventing people from leaving a given area, and 'securing' that area, requires that the agents rely on their authority, if not actual threats of force, to restrict freedom of movement and the 'freedom to walk away.'"

....  
 "[T]he entire notion of 'securing the premises' necessarily implies that those on the premises are made aware of the presence of INS agents."

....  
 "Indeed when agents are stationed at points of egress, it is only reasonable to infer that they are there in order to restrict egress. . . . This limitation on the freedom to walk away means that a seizure has occurred for purposes of the fourth amendment."

531 F.Supp. at 1019 (citations omitted).

We think the reasoning of the *Pilliod* court is persuasive.<sup>11</sup> The facts suggesting a seizure of the workforce in this case mirror the facts involved in the factory sur-

<sup>11</sup> The stationing of INS agents at factory exits was also present in the search of the H & H factory in *Babula v. INS*, 665 F.2d 293, 294 (3d Cir. 1981). However, the Third Circuit did not reach the question of whether the agents' presence at the exits in that case rose to a seizure implicating the Fourth Amendment, quite possibly since the court in that case had already determined in *Lee v. INS*, 590 F.2d 497 (3d Cir. 1979), that any questioning of workers pursuant to 8 U.S.C. § 1357(a)(1) is "limited by the restrictions of the fourth amendment." 665 F.2d at 295. The court in *Babula* held that the questioning of all of the factory workers at the H & H facility was justified by the "suspicions on the milieu in which the workers were found." 665 F.2d at 296.

veys that were the subject of the injunction in *Pilliod*. From the record in this case, we additionally observe that it appears that the stationing of the agents at exits and entrances is an integral feature of the successfully executed factory survey. The surrounding and securing of exits, the obvious function of which is to produce a captive workforce, in combination with the element of surprise, directly leads to many of the desired apprehensions. The total number of apprehensions would doubtless be reduced if the INS did not surround the facility surveyed in order to apprehend those attempting to flee. This flight of workers at a factory survey is a common occurrence as observed by INS investigators, as well as the appellants. We find unpersuasive the INS argument here that detention does not result from the execution of factory surveys where the use of detentive techniques significantly contributes to the apprehensions sought.

Nevertheless, the INS relies upon *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), for the proposition that the detention, if any, that existed during the surveys did not rise to the level of a seizure contemplated by the Fourth Amendment. In *Mendenhall*, Justice Stewart, joined only by Justice Rehnquist, held that the stop and questioning by Drug Enforcement Agency (DEA) agents of Mendenhall in the public concourse of the Detroit Metropolitan Airport did not amount to a seizure of Mendenhall's person, implicating the Fourth Amendment. We fail to find *Mendenhall* dispositive of the seizure issue in this case.

First, as admitted by the INS in its brief, the conclusion that no seizure occurred in *Mendenhall* was shared only by two justices. Three other justices (Powell, Chief Justice Burger, and Blackmun) did not reach the seizure issue since it had not been raised in the courts below, but concurred in the result finding that the DEA

agents had articulable and reasonable grounds for believing that Mendenhall was engaged in criminal activity. Although this court has adopted the test for seizure as enunciated in the Stewart opinion in *Mendenhall*, that test had never been adopted by a majority of the Supreme Court, nor has a majority of the latter court decided whether stopping and questioning of persons matching "drug courier profiles" in airport concourses amounts to a seizure protected by Fourth Amendment standards. See also *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980).

Second, even if the Court had decided that the minimal intrusions involved in *Mendenhall* and *Reid v. Georgia* did not constitute seizures, we would be compelled to view the detention and questioning of the workforces in the present case as far more intrusive. In *Mendenhall*, Justice Stewart concluded that Mendenhall "was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions." 446 U.S. at 555, 100 S.Ct. at 1878. The Court concluded:

"[N]othing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure."

446 U.S. at 555, 100 S.Ct. at 1878. When comparing *Mendenhall* to this case, we note that, in addition to being questioned as to their citizenship status, the workers at the factory in the present case were subjected to a procedure that included the intrusive aspects noted throughout this opinion; i.e., the threatening presence of a number of INS investigators, some stationed at exits, others carrying out the survey by proceeding methodically down the rows of workers.

The detentive environment created in the surveyed factories in this case is quite different from the casual stopping and questioning involved in *Mendenhall*, *Reid v. Georgia*, and our recent decision in *United States v. Beale*, 674 F.2d 1327, 1329-30 op. at 1671, 1673-74 (9th Cir. 1982).

Nor do we find *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979), and *Cordon de Ruano v. INS*, 554 F.2d 944 (9th Cir. 1977), helpful to the INS' position that no seizure occurred. Those two cases involved no Fourth Amendment violation when illegal aliens were voluntarily questioned in their homes. As is the case with *Mendenhall* and *Reid v. Georgia*, the level of detention and show of authority involved in *Cuevas-Ortega* and *Cordon de Ruano* simply do not match that involved in the present case.

The INS also cites to *Yam Sang Kwai v. INS*, 411 F.2d 683 (D.C.Cir.) cert. denied, 396 U.S. 877, 90 S.Ct. 148, 24 L.Ed.2d 135 (1969), for the proposition that seizures must be personal and not general, the implication being that the stationing of agents at the exits in the present case could only rise to a general detention or seizure not cognizable as a Fourth Amendment seizure of each worker. We disagree.

*Yam Sang Kwai* does not advance the INS' position. *Yam Sang Kwai* involved a petitioner's argument that he was arrested the moment agents surrounded the outside of the restaurant where he was employed. *Yam Sang Kwai* never saw any of these agents until he was personally confronted. The D.C. Circuit rejected such an *ex parte* arrest notion, observing that a seizure must contain some element by which the seized person is made aware that personal liberty has been restrained. 411 F.2d at 686. The petitioner in *Yam Sang Kwai* was not aware of the agents' actions outside the restaurant and was arrested only after being personally confronted by an investigator who subsequently discovered proba-



ble cause for Yam Sang Kwai's arrest. In the present case, by contrast, the appellants noticed the presence of the INS at the factories immediately as the survey began. The appellants indicated that they were aware that the agents stationed at the exits physically prevented many workers from leaving. In addition, the number of INS investigators, wearing badges and carrying handcuffs, gave the workers the impression that they were tacitly under the detentive powers of the INS for the duration of the survey. Whatever lack of awareness Yam Sang Kwai had is not present on the record before us. Viewing the record with all inferences drawn in favor of the appellants, as is our obligation under our standard of review, we must conclude that the workers at the plants surveyed in this case were aware immediately of the detentive nature of the survey prior to any personal confrontation or interrogation.

Directly addressing the test for Fourth Amendment seizure as stated in *Anderson, supra*, the record indicates that regardless of the fact that some of the four named appellants had varying degrees of freedom to circulate through or exit the factories, the number of INS investigators employed during the surveys and the method of survey execution represented a threatening presence of INS agents to the reasonable worker. The investigators' authority was announced verbally and the display of INS badges worn by the investigators served as a continual reminder of that authority. Agents stationed at exits indicated to the entire workforce that departures were not to be contemplated. Some agents carried handcuffs and used them to detain those apparently suspected of being in this country illegally. The operation unfolded with surprise and resulted in sustained disruption of the working environment. The element of surprise was used to prevent undetected departures, and the methodical execution of the operation with a line of agents proceeding down the

rows of workers could reasonably be viewed as a threatening presence. Under these circumstances, we must conclude that even before individual questioning began, a reasonable worker "would have believed that he was not free to leave." *Anderson, supra*, 663 F.2d at 939. We therefore hold that the manner in which the factory surveys were conducted in this case constituted a seizure of the workforce implicating the Fourth Amendment.

2. The Fourth Amendment Prohibits Detentive Questioning of a Workforce Unless INS Investigators Can Articulate Objective Facts and Rational Inferences From Those Facts That Warrant a Reasonable Suspicion That Each Questioned Person is an Alien Illegally in this Country.

Having determined that a seizure of the workforce occurs during the factory surveys, our next task is to determine the constitutional standard applicable to the INS conduct.

The INS argues that even if a seizure implicating the Fourth Amendment is found, that the intrusion upon the privacy and security interests of the appellants was so slight as to constitute no Fourth Amendment violation, relying upon *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).<sup>12</sup>

<sup>12</sup> The INS position, in the event we find, as we do, that *Martinez-Fuerte* is inapplicable, apparently is a concession that the Fourth Amendment requires agents to articulate a reasonable suspicion of illegal alienage for detentive questioning. The INS provided the district court with excerpts from the INS Handbook "M-69" entitled "The Law of Search and Seizure for the Immigration Officer," published by the United States Department of Justice, Immigration and Naturalization Service. The Handbook states:

"To stop and question a person encountered in establishments such as restaurants, factories, or hospitals, or beyond 25 miles from any external boundary of the United

The appellants, however, maintain that *Dunaway, supra*, requires the INS to question only those it may have probable cause to arrest during the factory surveys and, in the alternative, for the application of a standard comparable to that applied to automobile stops in *Brignoni-Ponce*. The appellants argue that an element of illegality and an element of individualized suspicion are required for sufficient protection of the Fourth Amendment rights of the workers. We agree with the appellants.

In other factual contexts, the Supreme Court has held that for an investigatory seizure or brief detention to be justified, law enforcement officials must be able to point to articulable and objective facts that the particular person being stopped or detained is suspected of criminal activity. *United States v. Cortez*, 449 U.S. at 417, 101 S.Ct. at 695, and cases cited therein. The above standard is an application of the "ultimate

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States, regarding his right to enter or remain in the United States, an officer must have a reasonable suspicion based on specific articulable facts and rational inferences drawn from those facts that the person is an alien. *However, to detain such a person, the officer must have a reasonable suspicion that he is an alien illegally in the United States.*"

Memorandum in Support of Defendants' Motion for Summary Judgment, Exhibit H, at 64, C.R. 112 (Footnotes omitted, emphasis added). "Detention not amounting to arrest" is defined as "Temporary forcible restraint, usually for the purpose of conducting further investigation." *Id.* at 61. A reasonable suspicion that a person is an alien illegally in this country:

"may be based on such factors as the officer's knowledge of a high concentration of illegal aliens in the area or of recent illegal border crossings, a specific tip from a reliable informant, the subject's excessive-nervousness or studied nonchalance upon being in the presence of or questioned by an immigration officer, or the subject's admissions."

*Id.* at 60-61.

Whether the suggested factors sufficiently meet the constitutional standard is another question which we take up in section IV.3 of this opinion.

standard of reasonableness embodied in the Fourth Amendment," *Michigan v. Summers*, 452 U.S. at 699-700, 101 S.Ct. at 2592-93, and, with the exception of *United States v. Martinez-Fuerte*, requires law enforcement officials to have a reasonable, individualized suspicion that the particular person being detained is engaged in wrongdoing. *United States v. Cortez*.

This appeal presents two difficult issues regarding the constitutional standard applicable to INS citizenship status questioning during factory surveys. The first issue is created by an open question noted by the Supreme Court; i.e., whether citizenship status questioning is constitutionally valid when based upon a suspicion of alienage alone. The second issue is a question whether less than an individualized suspicion is sufficient for questioning workers present in a factory known to employ illegal aliens. We decide the first question by holding that a suspicion of alienage alone is insufficient. We answer the second by noting that case law in other contexts requires an individualized suspicion to justify investigatory seizures and detentions and should also be required in the context of the INS factory survey.

- a. The Fourth Amendment Requires a Reasonable Suspicion That Those Detained and Questioned are in this Country Illegally.

In *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), the Supreme Court announced the Fourth Amendment standard applicable to non-border vehicular stops:

"Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be *illegally in the country*."

422 U.S. at 884, 95 S.Ct. at 2582 (emphasis added).

As for non-vehicular stops and questioning, the Court noted:

"[W]e reserve the question whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. See *Cheung Tin Wong v. INS*, 152 U.S.App.D.C. 66, 468 F.2d 1123 (1972); *Au Yi Lau v. INS*, 144 U.S.App.D.C. 147, 445 F.2d 217, *cert. denied*, 404 U.S. 864, 92 S.Ct. 64, 30 L.Ed.2d 108 (1971). The facts of this case do not require a decision on the point."

422 U.S. at 884 n.9, 95 S.Ct. at 2582 n.9. The stopping<sup>13</sup> and questioning of persons as opposed to the stopping of vehicles is, of course, the question directly presented in the instant case.

Since *Brignoni-Ponce*, various courts of appeal have struggled with the answer to the question reserved in footnote 9 quoted above. The D.C. Circuit cases cited by the Court in footnote 9 of *Brignoni-Ponce* have established the benchmark standards from which the rules in other circuits seem to have evolved. The D.C. Circuit has consistently adhered to the rule that an INS agent, pursuant to statutory authority under section 287(a)(1) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1357(a)(1),<sup>14</sup> may question a person as to his right to be or remain in the United States without forcible detention as long as the agent has a reasonable belief that the questioned person is an alien; *Yam Sang*

<sup>13</sup> We will assume that the statement referring to "stopping" applies to the facts indicating a detention in this case.

<sup>14</sup> Section 287(a)(1) of the Act, 8 U.S.C. § 1357(a)(1) provides: "Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have the power without warrant—

"(1) To interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; . . ."

*Kwai v. INS*, *supra*, and *Blackie's House of Beef v. Castillo*, 659 F.2d 1211, 1226 (D.C.Cir.1981), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982); but agents may forcibly detain a person temporarily for questioning "under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country." *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C.Cir.1971), *cert. denied*, 404 U.S. 864, 92 S.Ct. 64, 30 L.Ed.2d 108 (1971). *See also*, *Ojeda-Vinales v. INS*, 523 F.2d 286 (2d Cir. 1975). This dual standard thus imposes both a constitutional limitation and a statutory limitation upon the conduct of INS agents. If the nature of the agent's conduct employed during the questioning of a suspected alien amounts to a seizure implicating the Fourth Amendment, an INS agent must articulate a reasonable suspicion that the questioned person is an alien illegally in this country. If no seizure is employed, the agent need not articulate reasons to suspect the illegal presence of the person questioned, only a reasonable belief in the questioned person's alienage, the authority granted the INS agent by section 1357(a)(1). Until recently, both standards have been interpreted to require a particularized or individualized suspicion or belief regarding each questioned person in order to justify the intrusion resulting from the questioning.<sup>15</sup>

The *Au Yi Lau* and *Yam Sang Kwai* shifting standards based upon the degree of detention involved during INS citizenship status questioning appear to be the standards presently employed in the Seventh Circuit, *Illinois Migrant Council v. Pilliod*, 548 F.2d 715

<sup>15</sup> *See Babula v. INS*, 665 F.2d 293, 295 (3d Cir. 1981) (less than an individualized suspicion, but one based upon the "suspicions on the milieu in which the [questioned] workers were found," is sufficient to justify questioning under 8 U.S.C. § 1357(a)(1)).

(7th Cir. 1977) (en banc). However, such shifting standards, when applied to street encounters, were rejected forcefully in *Marquez v. Kiley*, 436 F.Supp. 100, 113-114 (S.D.N.Y., 1977).<sup>16</sup> The dual standard was also modified in *Lee v. INS*, 590 F.2d 497 (3d Cir. 1979), where the Third Circuit criticized the fine line drawing required to distinguish detentive from nondetentive questioning, and adopted a standard which combines the detention inquiry with the justification inquiry. The standard currently employed in the Third Circuit asks whether the INS stopping and questioning was reasonably related in scope to the justification for its initia-

<sup>16</sup> In *Marquez*, the district court observed:

"[W]hatever theoretical appeal there may be to a rule which permits casual, voluntary questions upon suspicion of alienage alone, but requires suspicion of illegality for detention, is in our view substantially undermined by the realities of the matter. It is in the nature of an oxymoron to speak of 'casual' inquiry between a government official, armed with a badge and a gun and charged with enforcing the nation's immigration laws, and a person suspected of alienage. This is particularly so in the context of area control operations as described at trial. In such situations a suspect alien is suddenly confronted by INS officers who have just driven up in an automobile, left the car and directly approached, and immediately queried as to his nationality. For a constitutional rule in these matters to depend on the 'voluntary cooperation' of the suspect is to impose a gloss upon real life. When it is further considered that refusal to cooperate or an attempt to evade such a 'casual encounter,' indeed, even the appearance of nervousness, may well be held to provide reasonable grounds to suspect unlawful presence and therefore to authorize forcible detention, see, e.g., *Au Yi Lau v. INS*, *supra*, 445 F.2d at 220; cf. *United States v. Oates*, 560 F.2d at 45 (2d Cir. 1977) (and cases cited there), the rule urged upon us by the government appears unworkable. Although application of the Fourth Amendment requires courts at times to develop artificial constructs which can never precisely conform to the fluid and infinitely various nature of contacts between government officers and the populace, in formulating such rules a court should not ignore the realities of everyday life."



tion. *Id.* at 502; see also *Babula v. INS*, 665 F.2d 293, 295 (3d Cir. 1981) (applying the *Lee* standard, but allowing less than an individualized suspicion to be sufficient for citizenship status questioning).<sup>17</sup>

The Ninth Circuit standard is more in doubt. In *Cordon de Ruano v. INS*, 554 F.2d 944 (9th Cir. 1977), this court rejected an alien's argument that her Guatemalan passport, voluntarily given to INS agents during non-detentive questioning of her, should have been suppressed at her deportation hearing. This court noted that the passport was not illegally seized because the petitioner, Cordon de Ruano, was not "stopped" or "detained," and quoted dicta from *United States v. Brignoni-Ponce*, *supra*, as the established rule that "the INS may not stop or detain persons to question them about their citizenship 'on less than a reasonable suspicion that they may be aliens.'" 554 F.2d at 946, quoting *Brignoni-Ponce*, 422 U.S. at 884, 95 S.Ct. at 2582, 45 L.Ed.2d at 618. Conspicuously absent from the quoted rule is any requirement that the INS agents suspect that the questioned person is in this country illegally. That the quoted rule is dicta is made apparent by footnote 9 in *Brignoni-Ponce*, where the Court reserved the question "whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country." *Id.* Since *Cordon de Ruano* did not require an elicitation of the suspicion standard for stopping and questioning persons since the court found no stop or detention, the case should be read only in aid of determining when a stop and/or detention has occurred which would invoke the appropriate constitutional standard.

A year after the decision in *Cordon de Ruano*, this court found evidence sufficient for the creation of

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<sup>17</sup> See discussion of *Babula* at section IV.2.b. of this opinion.

"founded suspicion to detain" suspected aliens under section 1357(a), citing the D.C. Circuit cases of *Au Yi Lau*, *supra*, and *Yam Sang Kwai*, *supra*. *Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1245, 59 L.Ed.2d 472 (1979). The court in *Cabral-Avila*, assuming, without deciding, that probable cause was necessary prior to arrest of the petitioners in that case, held that the "founded suspicion that these persons were *illegal* aliens ripened into probable cause...." *Id.* at 959 (emphasis supplied). *Cabral-Avila* can be read consistently with *Au Yi Lau* to require a suspicion of *illegal* alienage before detention is permitted.

Following *Cabral-Avila*, this court was again called upon to decide whether the non-detentive questioning of an illegal alien at the threshold of her apartment, where she freely admitted her illegal alienage, was violative of the Fourth Amendment. *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979). As in *Cordon de Ruano*, the court found no seizure or detention implicating the Fourth Amendment. In a footnote, the *Cuevas-Ortega* court explained that in a situation in which a seizure is involved, "a non-border stop or detention to question a suspected illegal alien about his citizenship requires "reasonable suspicion." *Id.*, 588 F.2d at 1277. The latter expression of the standard required for stopping and questioning can also be construed to require a reasonable suspicion of *illegal* alienage because of the immediate reference to *Brignoni-Ponce* in the footnote and because the language expressing the standard mentions illegal alienage.

More recently, this court affirmed a district court order suppressing a document which was the basis for an indictment under 18 U.S.C. § 1426(b) for use of forged immigration documents, because the document was elicited from the defendant under circumstances in

which the INS agents failed to articulate "sufficient independent grounds to suspect [the defendant] of being an illegal alien." *United States v. Heredia-Castillo*, 616 F.2d 1147-49 (9th Cir. 1980) (Merrill, J., dissenting) (emphasis supplied). the court concluded that the agents had sufficient justification for stopping the vehicle under *Brignoni-Ponce*, but the majority decided that after the agents had discovered the driver of the vehicle to possess proper papers, the agents had insufficient justification for questioning the passenger, Heredia-Castillo. After discounting most of the government's proffered justifications for questioning Heredia-Castillo, the court noted that only two factors were supported by the record: that Heredia-Castillo was found in an area in which illegal aliens were frequently found, and that he appeared to be of Mexican ancestry. Those two observations were insufficient to justify the questioning of Heredia-Castillo. Discussing the latter factor, this court noted:

"The government has enumerated several facts which might cast a certain suspicion on every person in the area who appeared to be of Mexican ancestry. Under the record before us, such a generalized suspicion is not sufficient for us to overturn the trial court's ruling."

616 F.2d at 1150.

*Heredia-Castillo* is significant for a number of reasons. First, since the court held that the vehicle was properly stopped based upon the agents' reasonable suspicion that the driver might be an illegal alien (emphasizing the factor that one of the agents recognized the driver as a man he had previously been arrested for being illegally in the country), the court was not willing to transfer this justification for the additional detention and questioning of the vehicle's passenger when the driver was found to be in the country legally. For this, the court required sufficient independent

grounds to suspect Heredia-Castillo of being an illegal alien—an individualized suspicion. Since Heredia-Castillo was already physically stopped when the INS agents focused their questions upon him, the court then applied the standard of founded suspicion to suspect illegal alienage to justify continued detention and questioning. For this, the agents were not allowed to focus merely upon Heredia-Castillo's apparent Mexican ancestry and the fact that he was present in an area known to contain illegal aliens—such a generalized suspicion is insufficient for further detention and questioning.

Finally, this court interpreted section 1357(a)(1) in *Tejeda-Mata v. INS*, 626 F.2d 721 (9th Cir. 1980), in a way that suggests that section 1357(a)(1) must be interpreted consistently with the Fourth Amendment if a seizure is involved. The court in *Tejeda-Mata* recited the language of section 1357(a)(1) and cites to *Ojeda-Vinales*, *supra* *Cheung Tin Wong*, *supra*, and *Au Yi Lau*, *supra*. As discussed above, those cases all require an agent to articulate a reasonable suspicion of *illegal* alienage before detentive questioning can occur. In *Tejeda-Mata*, the court refused to suppress the alien's admission of alienage, noting that the petitioner was not arrested or threatened with curtailment of his liberty, citing *Cordon de Ruano*, *supra*.<sup>18</sup>

<sup>18</sup> Having concluded that no seizure was involved in *Tejeda-Mata*, the court went on to explain the reasonableness under section 1357(a)(1) of the Immigration Officer's belief as to Tejeda-Mata's alienage justifying the interrogation that took place in that case. The courts discussion as to the statutory standard in *Tejeda-Mata* could be regarded simply as dicta or it could be seen as this court's acknowledgment that immigration officials, in the absence of a constitutional violation, must meet the statutory standard requiring a reasonable belief in the questioned person's alienage. Since the facts in this case do not require a decision regarding the statutory standard, we decline to clarify the discussion of section 1357(a)(1) in *Tejeda-Mata*.

Our reading of the case law in this circuit regarding detentive questioning by the INS as discussed immediately above requires us to hold that INS investigators may not seize or detain workers for citizenship status questioning unless the investigators are able to articulate objective facts providing investigators with a reasonable suspicion that each questioned person, so detained, is an alien illegally in this country.

The element of illegality contained in the standard has been suggested by recent Court pronouncements of Fourth Amendment standards applicable to brief detentions short of formal arrests. In *Michigan v. Summers*, the Court discussed its precedent permitting minimal intrusions and stated:

"These cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, *so long as police have an articulable basis for suspecting criminal activity.*"

452 U.S. at 699, 101 S.Ct. at 2592 (emphasis added). In *United States v. Cortez*, *supra*, the Court stated that "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." 449 U.S. at 417-18, 101 S.Ct. at 694-95.<sup>19</sup>

The element of illegality contained in the standard is also required in order to minimize the effects of en-

<sup>19</sup> See also *Brown v. Texas*:

"[E]ven assuming that [prevention of crime] is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it."

*Id.* 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979).

forcement procedures felt by innocent workers. Our focus is not limited to a discussion of the rights of aliens. As the Court noted in *Brignoni-Ponce*:

"Although we may assume for purposes of this case that the broad congressional power over immigration, . . . authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in this country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens."

422 U.S. at 883-84 (citations omitted). The status of alienage does not imply that any particular aliens is in this country illegally. An alien, as either an immigrant or non-immigrant, may be in this country in total compliance with the immigration laws. Reliance upon section 1357(a)(1) therefore is insufficient. Although the statute is silent as to any requirement of suspicion of illegal presence, to assert that section 1357(a)(1) justifies the detentive questioning of an entire workforce simply ignores the truism that innocent citizens and aliens legally employed at surveyed factories enjoy the same right to be free of the indignity of arbitrary government intrusions which the Fourth Amendment guarantees all individuals. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S.Ct. 1391, 1395-96, 59 L.Ed.2d 660 (1979).

We realize that our holding here limits section 1357(a)(1) questioning in the context of factory surveys of the nature presented by the facts of this case. But this is not the first time the statute has been so limited. The Court has held that section 1357(a)(1) cannot justify a constitutional violation, *Brignoni-Ponce, supra*; and we are mindful of the Court's more general admonition that "no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). In view of the above, and the par-

ticular facts involved in this case, we think that a standard allowing detentive questioning on a suspicion of alienage alone would diminish the privacy and security interests of both citizens and aliens legally in this country. Random detentive questioning of all who may appear to be aliens without objective facts giving rise to a suspicion of illegal alienage would grant the INS impermissible discretion to detain and question at whim. See *Delaware v. Prouse*, *supra*.

b. The Fourth Amendment Requires an Individualized Suspicion of Illegal Alienage of Those Subject to Detentive Questioning.

As with the illegality requirement of the standard, detentive questioning, if not based upon an individualized, articulable suspicion, would be impermissibly random. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Heredia-Castillo*, *supra*.

The INS contends that individualized suspicion is not required. The INS relies upon *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), arguing that even if a seizure were present during the factory surveys, that it was minimal; and, consequently, the government's interest in apprehending illegal aliens outweighs any interest of the questioned workers to be free from this minimal intrusion. In *Martinez-Fuerte*, the Supreme Court sanctioned the practice of the Border Patrol at permanent checkpoints to refer some vehicles to a secondary inspection area for additional questioning of citizenship status of the passengers of the vehicle on less than a particularized or individualized suspicion as to each person subjected to the referral, noting that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *Id.*, 428 U.S. at 543, 96 S.Ct. at 3074. The requirement of individualized suspicion was not imposed in *Martinez-Fuerte* because the re-



sulting intrusion of the permanent checkpoint stops on the interests of the motorists was minimal and outweighed by the substantial law enforcement interests involved. The INS argues that the intrusion, if any, in the instant case, is less than that permitted in *Martinez-Fuerte*, and that the same governmental interest in enforcement of the immigration laws makes it permissible for the INS to question factory workers on less than an individualized suspicion.

The appellants, on the other hand, find *Martinez-Fuerte* inapplicable. The appellants emphasize the Court's limited holding in *Martinez-Fuerte* to permanent checkpoints because motorists at these checkpoints are not taken by surprise and that the routine operation of the checkpoints involves little discretionary law enforcement. 428 U.S. at 559, 96 S.Ct. at 3083. The appellants argue that the facts of the instant case are more like a roving border patrol stop than a permanent checkpoint, contending that the individualized suspicion standard imposed in *Brignoni-Ponce* should apply here. We must agree with appellants.

Although we recognize the weighty law enforcement interests involved,<sup>20</sup> the language in *Martinez-Fuerte* is more supportive of the appellants' position than that of the INS. In discussing the differences between a permanent checkpoint stop and a roving patrol stop in *Martinez-Fuerte*, the Court noted that while the objective intrusion (the stop itself, the questioning and visual inspection) was similar in both cases, the subjective intrusion (concern or fright on the part of lawful travelers) in a roving stop was much greater. The Court noted that when compared with a roving patrol stop, the permanent checkpoint stop was much less intrusive because motorists were not taken by surprise and that

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<sup>20</sup> See, e.g., the discussion of the law enforcement problem involved in *Martinez-Fuerte*, *supra*, 428 U.S. at 551-53, 96 S.Ct. at 3080.

checkpoint operations "both appear to and actually involve less discretionary enforcement activity." 428 U.S. at 559, 96 S.Ct. at 3083. Commenting on the procedure of selective referral at the checkpoints, the Court stated:

"Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature."

428 U.S. at 560, 96 S.Ct. at 3084. In comparison to that statement, the record in the instant case contains evidence that the factory surveys were quite frightening to the workers, leaving many in a state of anxiety over perceived recurrence of the surveys and subsequent arrests. Instead of the three or four minute routine detention of lawful motorists at the permanent checkpoint in *Martinez-Fuerte*, the record in this case indicates a relatively greater degree of disruption from the surprise entry of the workplace for the typical hour and one-half of questioning and for some time thereafter. Moreover, the actual implementation of the factory surveys in the instant case suggests more random enforcement, giving agents greater discretion than is involved in the checkpoint operation. By securing exits and systematically proceeding in a line down rows of workers, the INS factory survey compares more to an unannounced automobile checkpoint located and operated by surprise wherein all motorists are detained for an hour and one-half, while the agents systematically scrutinize all detained motorists and passengers, choosing those the agents wish to question. The factors involved in a permanent checkpoint on highways that balance against impermissible discretionary law enforcement, i.e., no surprise, short duration, minimal disruption, are simply not present in the instant case. The factory survey in which an entire workforce is detained and subjected to INS scrutiny, a survey requir-

ing the element of surprise in order to be successful, is an operation presenting serious dangers to the Fourth Amendment rights of citizens and legal alien workers. Such a survey cannot be considered to be as minimally intrusive as a permanent checkpoint stop. We therefore reject the notion that *Martinez-Fuerte* allows factory survey questioning of individual workers on less than a particularized or individualized suspicion of each worker questioned.

By rejecting the *Martinez-Fuerte* analogy, we necessarily reject *Babula v. INS*, 665 F.2d 293 (3d Cir. 1981), to the extent that case stands for the proposition that factory survey questioning is constitutionally permissible on less than a particularized suspicion. In *Babula*, the INS had received information from a reliable source that H & H Industries at Pennsauken, New Jersey, had employed illegal aliens. The information listed seven named Polish aliens and the source informed the INS that the company had employed additional unnamed illegal aliens. INS records suggested that six of the seven named persons were not subject to deportation. After deciding that the H & H Factory would be a feasible location for an "area control operation," the INS agents carried it out by using six agents, three posted at the exits of the factory "to prevent anyone from leaving the factory," and three entered the factory. Upon entry, the agents spoke with the general manager and the night foreman, inquiring about the seventh named, suspected illegal alien, and were informed that this person no longer worked at the factory. Thus, with no information as to any particular named persons who were suspected of being in the country illegally, the agents began questioning workers in the factory as to their citizenship status and whether they had the proper papers. Ten workers were arrested. All petitioners in the *Babula* case were found deportable by an immigration judge, the deportation

orders subsequently being affirmed by the Board of Immigration Appeals.

One of the issues raised by the petitioners in *Babula* was whether the agents had violated their Fourth Amendment rights by questioning them at the factory pursuant to 8 U.S.C. § 1357(a)(1). The Third Circuit had held previously that section 1357 was limited by the restrictions of the Fourth Amendment. *Lee v. INS*, 590 F.2d 497, 499-500 (3d Cir. 1979). Reaching the merits of the Fourth Amendment contention, the Third Circuit in *Babula* noted:

"[I]n this case the agents had observed nothing specifically about each person questioned, but rather based their suspicions on the milieu in which the workers were found. We hold that the tip from a reliable source about the employment of illegal Polish aliens, combined with the indicia that H & H did employ Polish aliens, are sufficient to justify the minimally intrusive questioning that the agents conducted."

665 F.2d at 296. The court proceeded to justify its "milieu" standard by indicting that "individualized suspicion is not required ... when 'we deal neither with searches nor with the sanctity of private dwellings.'" *Id.* The court also emphasized that the INS agents were not allowed unfettered discretion because "all the employees rather than a selection of them" were questioned at H & H. *Id.* at 296-97.

We have serious problems with the *Babula* reasoning and find it inapposite to the facts of this case. The questioning of workers at the H & H facility on less than an individualized suspicion that each questioned worker was an illegal alien appears to be a departure from the suspicion required in the Third Circuit's own case of *Lee v. INS*, *supra*. Even though *Lee* rejected the dual, constitutional/statutory standard based upon the degree of detention involved that is the standard suggested in *Pilliod*, *Au Yi Lau* and *Yam Sang Kwai*, the

facts of *Lee* required the Third Circuit to determine that the INS agent had sufficient articulable facts concerning Lee individually that the scope of the detention in that case was reasonably related to the justification for its initiation. See dissenting opinion of Adams, J.; 665 F.2d at 300. *Babula* now extends the rule to situations in which the INS can prove the reasonableness of the questioning based upon information that the factory has employed illegal aliens in the past. For this holding, the Third Circuit notes that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search and seizure, [there is] no irreducible requirement of such suspicion . . . ." *Babula*, 665 F.2d at 296 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976)).

In addition, the Third Circuit noted that the INS questioned all of the workers at H & H, which the court apparently felt justified the questioning since the questioning of all workers does not involve the INS in the kind of discretionary law enforcement activity that was struck down in *Delaware v. Prouse*, *supra*.<sup>21</sup> It is therefore unclear what the Third Circuit would do were it presented with a case, such as the one presented to us here, where less than all workers were questioned.<sup>22</sup>

Finally, the *Babula* court attempted to harmonize its holdings with that of the Seventh Circuit in *Illinois Mi-*

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<sup>21</sup> "To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ." *Delaware v. Prouse*, 440 U.S. at 661, 99 S.Ct. at 1400 (quoting *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968)).

<sup>22</sup> As for the Davis surveys, the INS admits that it was impossible for them to question every worker out of the workforce of from 200-300 workers. Affidavit of Philip Smith, C.R. 14, at 3.

*grant Council v. Pilliod, supra.* The *Babula* court stated that the holding in *Babula* did not imply any disagreement with *Pilliod* because *Pilliod* involved late night, warrantless searches of living quarters. 665 F.2d at 297. This attempted harmonization is difficult to comprehend. First, the preliminary injunction in *Pilliod* was directed at factory area control operations, as well as searches of dwellings, dormitories and street encounters. See *Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882, 886-891 (N.D.Ill.1975). Second, the factual discussion in *Babula* does not express the degree of detention, if any, that the workers at H & H suffered while being questioned during the area control operation there. All we know is that "three agents remained at the exits to the factory to prevent anyone from leaving the factory." 665 F.2d at 294. If *Babula* and *Pilliod* can be harmonized, it could only be from inferring that the *Babula* court felt that the degree of detention of the workers at H & H was of the non-detentive nature. This still does not entirely agree with the relief granted in *Pilliod*, for even if non-detentive questioning were involved at H & H, our reading of *Pilliod* would still require the INS agents to have a reasonable belief that the particular persons questioned without detention were aliens. On that note, the Third Circuit merely indicates that the agents "had observed nothing specifically about each person questioned, but rather based their suspicions on the milieu in which the workers were found." 665 F.2d at 296. This "milieu" standard is simply inconsistent with the standard adopted by the Seventh Circuit in *Pilliod*, and, in our minds, inconsistent with that required by the Fourth Amendment.

Thus, *Babula* provides this court with little assistance in deciding the issues before us. The *Babula* court relied heavily upon *Martinez-Fuerte*, a case we find inapplicable to the factory surveys that are the basis of the litigation presented in this case. Also, the *Babula*

court noted that the methodical questioning of all of the workers at the H & H facility minimized the random discretion criticized in *Delaware v. Prouse, supra*. The INS admits that each worker was not questioned at the Davis survey in this case; therefore, any justification, if such exists, from the fact that all workers were questioned in *Babula*, does not transfer to this case.

In sum, the intrusive nature of the factory surveys in the present case is comparable to that found in a roving patrol stop discussed in *Brignoni-Ponce*, *Martinez-Fuerte*, and *Babula*, therefore, cannot be accepted as models for an announcement that the factory surveys are not violative of the Fourth Amendment. The detention and questioning of the workers in the surveyed factories must be based upon a reasonable suspicion that each worker subjected to detentive questioning is an alien illegally in this country, and the Fourth Amendment rights of all workers depend upon a standard requiring the INS to articulate an individualized suspicion that a questioned person is in this country illegally.

### 3. The Record fails to Substantiate the INS Claim That the Fourth Amendment Standard Was Met During the Factory Surveys.

Finally, we must apply the constitutional standard to the facts of this case. The INS argues that there was a sufficient basis for the questioning that occurred at the two factories. Relying on *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), where the Court defined reasonable suspicion to include an assessment of the totality of the circumstances surrounding a seizure in light of a law enforcement officer's experience, the INS points to a number of circumstances attending the factory surveys that justify the type of questioning that occurred. The INS directs our attention to the fact that the two factories surveyed were garment factories, an industry the INS alleges is



known to employ large numbers of illegal aliens; that prior to the Davis surveys, INS investigators had arrested several illegal alien employees outside the factory premises who stated that other illegal aliens were employed in the factory; that upon entry of the INS investigators into the plants, the employees shouted "La Migra" and a large number of employees began running around the factory or hiding; and that by the time of the second Davis survey, the INS investigators knew that they had previously apprehended 78 illegal aliens from the first survey. In addition, the INS once again asserts that it could justifiably question appellants Labonte and Miramontes, resident aliens, under 8 U.S.C. § 1357(a)(1).

None of the above factors alone, or in combination, can justify the detentive questioning in this case because we have held that the factory surveys conducted at the Davis and Mr. Pleat facilities involved a seizure or detention of the entire workforce by the nature in which the surveys were carried out.<sup>23</sup> Since the entire workforce is effectively detained in a manner implicating the Fourth Amendment standard discussed above, the circumstances the INS cites to justify the questioning simply do not aid our analysis of whether the INS had a reasonable, individualized suspicion of illegal alienage of each detained worker prior to the execution of the surveys. Moreover, we think the warrantless detention of the workforces in this case cannot possibly be justified under the standard we find applicable today.

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<sup>23</sup> Assuming a factory survey could be, or would be, performed in a non-detentive atmosphere, it is not appropriate in this case for us to provide the INS with a list of justifying factors for such a hypothetical survey. The constitutionality of questioning during such a non-detentive factory survey would be judged upon the specific facts giving rise to each instance of interrogation.

We feel the Fourth Amendment rights of workers would be impermissibly diminished were we to sanction the unconstrained use of warrantless, detentive questioning of the sort depicted by this record—questioning which is frightening to the workers, intrusive, and often “based on nothing more than inarticulate hunches.” *Terry v. Ohio*, 392 U.S. at 22, 88 S.Ct. at 1880. The suggestions in the INS “M-69” handbook that a reasonable suspicion of illegal alienage may be based on an officer’s knowledge of a high concentration of illegal aliens in the area surveyed, without more, is insufficient. *Heredia-Castillo*, *supra*. The apparent Hispanic ancestry of one sought for questioning, while possibly relevant, *see United States v. Brignoni-Ponce*, 422 U.S. at 886-87, 95 S.Ct. at 2582-83, is insufficient, even if noticed in conjunction with the knowledge of the presence of a person in an area known to contain a high concentration of illegal aliens. *Heredia-Castillo*, *supra*. That a factory happens to be a garment factory, without more, is insufficient grounds for the effective detention of the entire workforce in such a factory. Whether “excessive nervousness” or “studied nonchalance,” of a suspected illegal alien observed prior to detentive questioning, would be sufficient to meet the standard announced in this opinion is basically a factual question to be resolved on a case-by-case basis. The INS makes no claim here that such observations were made of the entire workforces at the surveyed factories.

Certainly, *United States v. Cortez*, *supra*, instructs courts to grant some deference to the field officer’s experience and his or her view of the totality of the circumstances attending any particular detention or apprehension. However, *Cortez* cannot be read to justify the detention of a workforce and questioning of workers on subjective or generalized suspicions that some unidentified workers in a factory may be found to be in

this country without proper documentation. The Court in *Cortez* held:

"Based upon [the] whole picture, the detaining officers must have a *particularized and objective* basis for suspecting the particular person stopped of criminal activity."

449 U.S. at 417-18, 101 S.Ct. at 694-95 (emphasis added). The suspicious facts offered by the INS which provide a general focus upon the factories surveyed, while possibly true, do not provide sufficient justification for the execution of the surveys in a manner which effectively detains an entire workforce. The factors listed by the INS fail to provide a particularized and objective basis prior to the execution of the surveys for suspecting any of the questioned workers of being aliens illegally in this country.

We recognize that our decision today may hinder INS efforts to seek out illegal aliens in workplaces. Acknowledging that fact, we think it also appropriate to acknowledge that this case effectively illustrates the irony noted by Justice White when he commented some years ago on the INS' struggle to contain the heavy flow of illegal aliens into this country:

"The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. *Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country.*"

Concurring opinion of Justice White, joined by Justice Blackmun in *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 914-15, 95 S.Ct. at 2597, and in *United States v. Ortiz*, 422 U.S. 891, 914-15, 95 S.Ct. 2585, 2597, 45 L.Ed.2d 623 (1975) (emphasis added). To find

the factory survey procedures evidenced by the record before us constitutional would be, as suggested by Justice White, straining the Fourth Amendment requirements in order to accommodate an intrusive and objectionable method of immigration law enforcement. The Constitution, as we interpret it, cannot be so accommodating. We therefore reverse the district court's summary judgment in favor of the INS on the issue of worker questioning.<sup>24</sup>

#### V. CONCLUSION

The summary judgment granted in favor of the INS on the issue of worker questioning is reversed. This case is remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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<sup>24</sup> The district court did not abuse its discretion in denying class certification. See *James v. Ball*, 613 F.2d 180, 186 (9th Cir. 1979), and cases cited therein.

Our holdings today also make it unnecessary to reach the issue of whether the district court correctly dismissed the ILGWU. The effects of our holdings will nevertheless inure to the benefit of the ILGWU.

APPENDIX B

THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

INTERNATIONAL LADIES' GARMENT WORKERS' UNION,  
AFL-CIO, ET AL., PLAINTIFFS-APPELLANTS,

v.

JOSEPH SURECK, ET AL., DEFENDANTS-APPELLEES.

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INTERNATIONAL LADIES' GARMENT WORKERS' UNION,  
AFL-CIO, ET AL., PLAINTIFFS-APPELLANTS,

v.

JOSEPH SURECK, ET AL., DEFENDANTS-APPELLEES

Nos. 80-5054, 80-5153, 80-5035, 80-5152

Filed Sep 30, 1982

ORDER

Before: ANDERSON and NORRIS, Circuit Judges, and  
MUECKE,\* District Judge.

The panel as constituted in the above case has voted  
to deny the petition for rehearing and to reject the sug-  
gestion for a rehearing en banc.

The full court has been advised of the suggestion for  
en banc rehearing, and no judge of the court has re-  
quested a vote on the suggestion for rehearing en banc.  
Fed. R. App. P. 35(b).

The petition for rehearing is denied and the sugges-  
tion for a rehearing en banc is rejected.

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\*The Honorable C.A. Muecke, Chief Judge, United States District  
Court, District of Arizona, sitting by designation.

## APPENDIX C

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

I. L. G. W. U., ET AL., PLAINTIFFS,

v.

JOSEPH SURECK, ET AL., DEFENDANTS.

No. CV78-0740-LEW(Px),

No. CV78-3246-LEW(Px)

Filed Feb 20 1980

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Defendants' motion for summary judgment and plaintiffs' motion for summary judgment were heard on February 4, 1980, before the Honorable Laughlin E. Waters, United States District Judge. Plaintiffs appeared by and through their counsel, Henry R. Fenton. Defendants appeared by and through their counsel, Andrea Sheridan Ordin, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, Chief, Civil Division, Molly Munger, Assistant United States Attorney, by Lawrence B. Gotlieb, Assistant United States Attorney. The Court makes the following findings of fact and conclusions of law.

## FINDINGS OF FACT

## I

This is a consolidated action. The pleadings of both actions make virtually identical claims. The most recent complaints on file in this action are the first amended complaint in No. CV78-0740-LEW (Px) (hereinafter "FAC") and the complaint in No. CV78-3246-LEW(Px) (hereinafter "COMPLAINT").

## II

The Court granted defendants' motion for partial summary judgment on December 3, 1979, and denied plaintiffs' cross-motion for partial summary judgment, finding that plaintiffs' prayers for an injunction against the use of search warrants or owner consent to obtain entry by investigators of the Immigration and Naturalization Service in the Central District of California (hereinafter "INS") in conducting surveys in work places were without merit and plaintiffs lacked standing.

## III

Plaintiffs' remaining prayer is "for an order enjoining the defendants from arresting, detaining, stopping and interrogating or otherwise interfering [sic] with the rights of the plaintiffs ostensibly because of their Latin appearance, unless the defendants possess a valid warrant to search for [sic] arrest with regard to the individual plaintiffs, have probable cause to search or arrest individual plaintiffs without a warrant, or have reasonable suspicion based on specific irrefutable facts that the plaintiffs are aliens unlawfully in the United States." (First Amended Complaint, prayer No. 2).

## IV

No material facts are in dispute. Each of the four plaintiffs was asked a question or questions by an INS investigator on one occasion during the surveys conducted by INS at Southern California Davis Pleating Company on January 4, 1977 and September 26, 1977, or at Mr. Pleat on October 7, 1977. On these dates some INS investigators were inside the factories and some were at the exits. At the surveys, 78 illegal aliens were arrested on January 4, 1977, 39 illegal aliens were arrested on September 26, 1977, and 45 illegal aliens were



arrested on October 7, 1977. None of the four plaintiffs was arrested or taken into custody.

## V

Any finding of fact which also contains a conclusion of law shall be deemed incorporated within the conclusions of law.

## CONCLUSIONS OF LAW

### I

Plaintiffs request for the proposed injunction is without merit as a matter of law. The conduct of INS investigators which plaintiffs claim took place is lawful.

### II

Law enforcement officials may ask questions of anyone so long as the person is not restrained or physically detained. *Terry v. Ohio*, 392 U.S. 1 (1968); *Cuevas-Ortega v. Immigration and Naturalization Service*, 558 F.2d 1274 (9th Cir. 1979); *Cordon de Ruano v. Immigration and Naturalization Service*, 554 F.2d 944 (9th Cir. 1977).

### III

An alien or person believed to be an alien may be questioned concerning his right to be in the United States. 8 U.S.C. § 1357(a) (1).

### IV

There was no arrest or detention of any of the plaintiffs. There was no other seizure of the plaintiffs under the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1 (1968). Even if plaintiffs had experienced some form of seizure by the placement of INS investigators at the factory exits, the degree of intrusion on plaintiffs was so limited that there was no violation of the Fourth Amendment. *Terry v. Ohio*, *supra*, at 20; *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-558 (1976).

## V

Accordingly, defendants' motion for summary judgment should be granted and plaintiffs' motion for summary judgment should be denied, and judgment should be entered in favor of defendants and against plaintiffs.

## VI

Any conclusion of law which also contains a finding of fact shall be deemed incorporated within the findings of fact.

DATED: This 15 day of Feb., 1980.

/s/

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UNITED STATES DISTRICT JUDGE

**APPENDIX D****UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA****I. L. G. W. U., ETC., ET AL., PLAINTIFFS,****v.****JOSEPH SURECK, ET AL., DEFENDANTS.****No. CV78-0740-LEW(Px)****No. CV78-3246-LEW(Px)****Filed Feb 15 1980****FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Defendants' motion for partial summary judgment and plaintiffs' motion for partial summary judgment were heard before the Honorable Laughlin E. Waters, United States District Judge, on December 3, 1979. Plaintiffs appeared by and through their counsel, Henry R. Fenton. Defendants appeared by and through their counsel, Andrea Sheridan Ordin, United States Attorney, Frederick M. Brosio, Jr., Chief, Civil Division, by Molly Munger, Assistant United States Attorney, and Lawrence B. Gotlieb, Assistant United States Attorney. On January 4, 1980, defendants moved to supplement the Findings of Fact and Conclusions of Law, which motion was not opposed by plaintiffs. The Court, having duly considered all the arguments by the parties, makes the following Findings of Fact and Conclusions of Law as to the parties' respective motion for summary judgment:

**FINDINGS OF FACT**

1. This is a consolidated action. The pleadings in both actions make virtually identical claims. The most recent complaints on file in the actions are the First Amended Complaint in Civ. No. 78-0740-LEW(Px) (hereafter

"FAC") and the Complaint in Civ. No. 78-3246-LEW(Px) (hereafter "Complaint").

2. Plaintiff I.L.G.W.U., a labor union, was dismissed from this action for lack of standing by order entered November 20, 1979. Hereinafter "Plaintiffs" refers to the remaining plaintiffs in this action.

3. Plaintiffs seek a declaratory judgment in the following form:

"[T]hat surveys of the Immigration status of the employees of a business establishment are unlawful unless conducted pursuant to a valid search warrant or the consent of the persons to be searched" (Complaint, prayer at ¶ 1);

"That an employer may not lawfully consent to a search of his employees" (Complaint, prayer at ¶ 1); and

"That defendants may not engage in the pattern of stopping or questioning the work force in a plant where the warrant does not specifically describe the individuals to be stopped or questioned" (Complaint, prayer at ¶ 1).

Plaintiffs have also demanded an injunction against:

"[T]he use of search warrants which are not particularized with respect to the individuals described." (Complaint, prayer at ¶ 2).

4. These provisions constitute a request that the Court order as follows:

(A) That the Immigration and Naturalization Service in the Central District of California ("INS") may not enter a workplace to conduct a survey without a warrant unless all of the employees at the workplace first consent to the entry; and

(B) That the INS may not use a search warrant to enter a workplace to conduct a survey unless the search warrant identifies each person with whom INS will have contact while inside the workplace.

5. No material facts necessary to support these claims are in dispute. Specifically:

- (A) The INS has not in the past followed the practice of obtaining the consent of all the employees at a workplace to conduct a workplace survey. Where a warrant has not been obtained before entering, the INS has instead relied on the consent of the owner or manager of the workplace.
  - (B) In obtaining a warrant to conduct workplace surveys, the INS has not in the past identified in the warrants every employee to be contacted.
  - (C) Plaintiffs do not control, either solely or jointly, access of other persons to the premises in which they are employed.
6. Any finding of fact which also contains a conclusion of law shall be deemed incorporated within the conclusions of law.

#### CONCLUSIONS OF LAW

1. Plaintiffs do not have a reasonable expectation of privacy in the factory premises in which they are employed.

2. Plaintiffs have no standing to challenge the entry of Immigration and Naturalization Service officers into the factory premises in which they are employed.

3. Plaintiffs have no standing to challenge either the warrant or the consent procedures by which Immigration and Naturalization officers gain access to the premises in which they are employed.

4. Plaintiffs' request for the proposed declaration and injunction is without merit as a matter of law. Specifically:

- (A) The owner or manager of a workplace may give a valid consent to an entry by the INS into his premises. *United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Gargiso*, 456 F.2d 584, 587 (2nd Cir. 1972); *United States v. Friedman*, 381 F.2d 155 (8th Cir. 1967).

- (B) A search warrant used by the INS to obtain access to a workplace for the purpose of INS law enforcement need not identify each and every person to be contacted by the INS while inside the workplace. In no case has this been required. See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (concurring opinion by Justice Powell); *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977); *United States v. Pacheco-Ruiz*, 549 F.2d 1204, 1207 (9th Cir. 1976); *United States v. Rodriguez*, 532 F.2d 834 (2d Cir. 1976); *United States v. Karathanos*, 531 F.2d 26 (2d Cir. 1976), *cert. denied* 428 U.S. 910 (1976).
- (C) Federal Rules of Criminal Procedure, Rule 41, as amended, authorizes the issuance of search warrants to gain access to illegal aliens who are present in places of employment, F.R.C.R.P., 41(b) (4).
- (D) The search warrants which are the subject of plaintiffs' motion describe the objects of the proposed searches with sufficient particularity to meet the requirements of F.R.C.R.P. 41 and the Fourth Amendment.
- (E) The affidavits supporting the search warrants which are challenged by plaintiffs do set forth sufficient probable cause.

5. Accordingly, partial summary judgment was entered for defendants on December 10, 1979, and the order denying plaintiffs' motion for partial summary judgment was entered on January 28, 1980.

6. Any conclusion of law which also contains a finding of fact shall be deemed incorporated within the findings of fact.

DATED: This 14 day of Feb., 1980.

/s/

---

UNITED STATES DISTRICT JUDGE

**APPENDIX E**

**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**I.L.G.W.U., ETC., ET AL., PLAINTIFFS,**

**v.**

**JOSEPH SURECK, ET AL., DEFENDANTS.**

No. CV 78-0740-LEW(PX)

No. CV 78-3246-LEW(PX)

Filed Dec 4 1979

Hearing Date: December 3, 1979

Time: 9:00 a.m.

**FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

Defendants having moved on December 3, 1979 for an order granting partial summary judgment in the above matter, the matter having been briefed and argued, and the Court having duly considered the arguments by all parties; the Court makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. This is a consolidated action. The pleadings in both actions make virtually identical claims. The most recent complaints on file in the actions are the First Amended Complaint in Civ. No. 78-0740-LEW (PX) (hereafter "FAC") and the Complaint in Civ. No. 78-3246-LEW (PX) (hereafter "Complaint").

2. Plaintiffs seek a declaratory judgment in the following form:

"[T]hat surveys of the Immigration status of the employees of a business establishment are unlawful unless conducted pursuant to a valid search war-



rant or the consent of the persons to be searched" (Complaint, prayer at ¶ 1);

"That an employer may not lawfully consent to a search of his employees" (Complaint, prayer at ¶ 1); and

"That defendants may not engage in the pattern of stopping or questioning the work force in a plant where the warrant does not specifically describe the individuals to be stopped or questioned" (Complaint, prayer at ¶ 1).

Plaintiffs have also demanded an injunction against:

"[T]he use of search warrants which are not particularized with respect to the individuals described." (Complaint, prayer at ¶ 2).

3. These provisions constitute a request that the Court order as follows:

(A) That the Immigration and Naturalization Service in the Central District of California ("INS") may not enter a workplace to conduct a survey without a warrant unless all of the employees at the workplace first consent to the entry; and

(B) That the INS may not use a search warrant to enter a workplace to conduct a survey unless the search warrant identifies each person with whom INS will have contact while inside the workplace.

4. No material facts necessary to support these claims are in dispute. Specifically:

(A) The INS has not in the past followed the practice of obtaining the consent of all the employees at a workplace to conduct a workplace survey. Where a warrant has not been obtained before entering, the INS has instead relied on the consent of the owner or manager of the workplace.

(B) In obtaining a warrant to conduct workplace surveys, the INS has not in the past identified in the warrants every employee to be contacted.

## CONCLUSIONS OF LAW

1. Plaintiffs' request for the proposed declaration and injunction is without merit as a matter of law. Specifically:

- (A) The owner or manager of a workplace may give a valid consent to an entry by the INS into his premises. *United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Gargiso*, 456 F.2d 584, 587 (2nd Cir. 1972); *United States v. Friedman*, 381 F.2d 155 (8th Cir. 1967).
- (B) A search warrant used by the INS to obtain access to a workplace for the purpose of INS law enforcement need not identify each and every person to be contacted by the INS while inside the workplace. In no case has this been required. See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (concurring opinion by Justice Powell); *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977); *United States v. Pacheco-Ruiz*, 549 F.2d 1204, 1207 (9th Cir. 1976); *United States v. Rodriguez*, 532 F.2d 834 (2d Cir. 1976); *United States v. Karathanos*, 531 F.2d 26 (2d Cir. 1976), *cert. denied* 428 U.S. 910 (1976).

DATED: This 3 day of Dec, 1979.

/s/

---

UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

I.L.G.W.U., ETC., ET AL., PLAINTIFFS,

v.

JOSEPH SURECK, ET AL., DEFENDANTS.

No. CV 78-0740-LEW (PX)

No. CV 78-3246-LEW (PX)

Filed Dec 4 1979

Hearing Date: December 3, 1979

Time: 9:00 a.m.

PARTIAL SUMMARY JUDGMENT

Defendants having moved on December 3, 1979 for an order granting partial summary judgment in the above matter, the matter having been briefed and argued, and the Court having duly considered the arguments by all parties,

IT IS HEREBY ORDERED as follows:

1. The motion for partial summary judgment is granted.

2. The following portions of the prayers set forth in plaintiffs' pleadings are denied:

A. The requests for declaratory relief as follows:

"[T]hat surveys of the Immigration status of the employees of a business establishment are unlawful unless conducted pursuant to a valid search warrant or the consent of the persons to be searched" (Complaint in Civ. No. 78-3246-LEW(PX) ("Complaint"), prayer at ¶ 1);

"That an employer may not lawfully consent to a search of his employees" (Complaint, prayer at ¶ 1; and

"That defendants may not engage in the pattern of stopping or questioning the work force in a

plant where the warrant does not specifically describe the individuals to be stopped or questioned" (Complaint, prayer at ¶ 1).

B. The request for an injunction against:

"[T]he use of search warrants which are not particularized with respect to the individuals described." (Complaint, prayer at ¶ 2.)

3. The following paragraphs from plaintiffs' pleadings are ordered stricken as surplusage:

First Amended Complaint in Civ. No. 78-0740-LEW(PX): Paragraphs 22, 23, 24, 26, 27, 35, 44, 45, 46. Complaint: Paragraphs 20, 21, 22, 24, 25, 34, 38, 39, 40, 41, 42, 43.

These paragraphs serve no purpose except to support the portions of the prayers which have now been denied.

DATED: This 4 day of Dec, 1979.

/s/

---

UNITED STATES DISTRICT JUDGE

**APPENDIX G**

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**I.L.G.W.U., ET AL., PLAINTIFFS,**

**v.**

**JOSEPH SURECK, ET AL., DEFENDANTS.**

**No. CV 78-0740-LEW(Px)**

**No. CV 78-3246-LEW(Px)**

**Filed Nov 16, 1979**

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS PLAINTIFF  
INTERNATIONAL LADIES' GARMENT  
WORKERS' UNION**

Defendants' Motion to Dismiss Plaintiff International Ladies' Garment Workers' Union ("ILGWU" or the "union") having come on for hearing before this Honorable Court on August 20, 1979, the parties having submitted their papers for decision, and the Court, having read and considered the papers filed in connection with this Motion, as well as the other papers and pleadings on file in this action, finds as follows:

1. This is an action for declaratory and injunctive relief brought by the ILGWU and four individuals who are employed in garment factories and are members of the union.

2. The plaintiffs seek to challenge on constitutional grounds certain alleged practices of the United States Immigration and Naturalization Service ("INS") followed by INS in conducting surveys in factories.

3. The ILGWU alleged in the First Amended Complaint that it was suing in its representational capacity and pursuant to Section 9(a) of the National Labor Relations Act (29 U.S.C. § 159(a)). In its Opposition to

Defendants' Motion, the ILGWU also alleged that it was suing on its behalf.

4. The ILGWU is an international labor organization. It functions as exclusive collective bargaining representative for employees at Southern California Davis Pleating Company and Mr. Pleat, the two garment factories which employ the four individual plaintiffs.

5. In order for an association such as ILGWU to maintain the instant action, it must satisfy the Article III constitutional requirement of having standing to sue, which may be done in one of two ways. First, the union may sue if it has specific, concrete injury to itself. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976). *Warth v. Seldin*, 422 U.S. 490, 508 (1975). Second, if it has no injury to itself, the association may sue as a representative of its members, but only if, *inter alia*, the interests it seeks to protect are germane to the association's purpose. *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

6. The union has made no showing of any specific, concrete injury to itself which would satisfy the constitutional requirement of standing to maintain this action on its own behalf.

7. The union has shown no cognizable right of its own which has been violated. Furthermore, Section 9(a) of the National Labor Relations Act (29 U.S.C. § 159(a)) does not confer any express right of action on the union in this action. Thus, even if the union had been able to satisfy the constitutional limitation of specific, concrete injury to itself, conferring standing, it fails to satisfy the prudential limitations to standing. *Warth v. Seldin*, *supra*, at 499-501.

8. There being no nexus between the purpose of the union and the relief sought in the instant action, i.e., an injunction against certain enforcement actions by the INS allegedly affecting persons of Latin ancestry, the

union lacks standing to maintain this action in any associational capacity.

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Plaintiff ILGWU is granted, and the action is dismissed as to plaintiff ILGWU.

Costs are taxed against ILGWU in the amount of \$ \_\_\_\_.

DATED: This 16 day of Nov, 1979.

/s/ LAUGHLIN E. WATERS

UNITED STATES DISTRICT JUDGE



**APPENDIX H**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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Nos. 80-5054, 80-5153, 80-5034, 80-5152

DC CV 78-3246, 78-0740

**INTERNATIONAL LADIES' GARMENT WORKERS' UNION,**  
**AFL-CIO, ET AL., PLAINTIFFS-APPELLANTS**

*v.*

**JOSEPH SURECK, ET AL., DEFENDANTS/APPELLEES**

---

**INTERNATIONAL LADIES' GARMENT WORKERS' UNION,**  
**AFL-CIO, ET AL., PLAINTIFFS-APPELLANTS**

*v.*

**JOSEPH SURECK, ET AL., DEFENDANTS/APPELLEES**

---

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered July 15, 1982

No. 82-1271

Office Court, U.S.  
E D  
AUG 5 1983  
ALEXANDER L. STEVAS,  
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1982

---

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,  
*Petitioners*

v.

HERMAN DELGADO, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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## JOINT APPENDIX

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REX E. LEE  
Solicitor General  
U.S. Department of Justice  
Washington, D.C. 20530  
(202) 633-2217  
(Counsel for petitioners)

HENRY R. FENTON  
Suite 1020  
3550 Wilshire Boulevard  
Los Angeles, California 90010  
(213) 380-3140  
(Counsel for respondents)

---

PETITION FOR CERTIORARI FILED JANUARY 28, 1983  
CERTIORARI GRANTED APRIL 25, 1983

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-1271

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,  
*Petitioners*

v.

HERMAN DELGADO, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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## INDEX \*

	Page
Relevant Docket Entries .....	1
First Amended Complaint No. 78-0740 .....	6
Complaint No. 78-3246 .....	18
Answer to Amended Complaint No. 78-0740 .....	30
Answer to Complaint No. 78-3246 .....	33
United States Department of Justice, Pub. No. M-69, <i>The Law of Search and Seizure for Immigration Officers</i> (Rev. June 1979), Excerpted at Exhibit H in Support of Defendant's Motion for Summary Judgment, Filed 1/18/80 .....	36
Declaration of Philip Smith, Exhibit A to Memorandum in Support of Defendants' Motion for Partial Summary Judgment, filed 11/19/80 .....	43

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\* The opinions of the Court of Appeals and the district court are printed in the appendix to the petition for writ of certiorari and have not been reproduced

Affidavit of Philip H. Smith, Exhibit B to Memorandum in Support of Defendants' Motion to Dismiss, filed 6/30/78 .....	46
Declaration of Philip H. Smith, Exhibit G to Memorandum in Support of Defendants' Motion for Summary Judgment, filed 1/18/80 .....	51
Affidavit of Gail R. Kee, Exhibit C to Memorandum in Support of Defendants' Motion to Dismiss, filed 6/30/78 .....	52
Interrogatory No. 6 and Answer, Exhibit F to Plaintiff's Memorandum in Support of Motion for Summary Judgment, filed 1/18/80 .....	55
Declaration of Wayne A. Cornelius, Exhibit G to <i>Ibid</i> ...	55
Declaration of Sheldon Maram, Exhibit H to <i>Ibid</i> . .....	62
Declaration of Joe Razo, Exhibit I to <i>Ibid</i> . .....	72
Declaration of Edward Tchakalian, Exhibit J to <i>Ibid</i> ...	75
Declaration of Georgia Wren Supporting Complaint No. 78-0740 .....	77
Excerpts of deposition of Herman Delgado .....	79
Excerpts of deposition of Ramona Correa .....	100
Excerpts of deposition of Marie Miramontes .....	117
Excerpts of deposition of Francisca Labonte .....	133
Excerpts of deposition of Richard Rice .....	148
Excerpts of deposition of Carlos Tellez .....	153
Order Granting Certiorari .....	159

CIVIL DOCKET—U.S. DISTRICT COURT

CV 78-0740

THE INTERNATIONAL LADIES GARMENT WORKERS UNION,  
AFL-CIO, HERMAN DELGADO and RAMON [sic] CORREA,  
PLAINTIFFS

v.

JOSEPH SURECK, GIL CLARIN, JAMES ROBINSON,  
FORTY UNNAMED AGENTS OF THE INS and INS  
GRIFFITH [sic] B. BELL, LEONEL J. CASTILLO and the  
IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS

DATE	PROCEEDINGS
2/24/78	Fld complt. Issd summs.
6/13/78	Fld Pltfs FIRST AMENDED COMPLAINT. Issd summs.
9/18/78	Fld Defts ANSWER to complt.
12/4/78	Case consolidated w/78-3246 LEW
5/30/79	Fld ORD (LEW) denying pltf's mtn fr class cert. (ENT 5/31/79).
11/16/79	Fld ORDER granting defts' motn to dsms pltf ILGWU and actn is dsmsd as to pltf ILGWU. (ENT 11/20/79).
11/27/79	Fld Pltfs' response to defts' motn for partial S/J.
11/28/79	Fld Pltfs' appendix to memo in suppt of pltfs' motn for partial S/J.
*11/19/79	Fld defts note of motn & motn for partl S/J retnbl 12-3-79, 9AM; prop ORD. Fld defts memo in suppt of defts' motn for partl S/J.
12/4/79	Fld ORD Granting defts' mot for prtl S/J (Ent 12/10/79).

DATE	PROCEEDINGS
*12/4/79 Fld defts' Note of motn and motn for partial S/J, retbl 12/3/79, 9 a.m.	
12/4/79 Fld Findgs of fact and Concls of law.	
1/4/80 Fld deft's note of motn & motn for supplemental findings of fact & conclusions of law; declartn; proposed suplmntal findings of fact & conclusions of law, set for 1/21/80 at 9am.	
LODGED deft's supplemntal findngs of fact & conclusion of law PL IN	
LODGED deft's ORD denying pltfs' motn for partial summary judgmt.	
1/8/80 Fld pltf's Note of APPEAL to 9th Cir C/A frm Ord ent 12-13-79	
1/18/80 Fld deft note of motn & motn for S/J set for 2/4/80 at 9am.	
1/18/80 Fld deft memo in suprt, motn for S/J set for 2/4/80 at 9am.	
LODGED deft's findngs of fact & conclusns of law, proposed.	
LODGED defts proposed judgment.	
1/28/80 Fld pltf's respond to defts' motn for S/J.	
2/5/80 Fld Jdmt & ORD ent in fvr of defts dismg the complt (Ent 2-7-80)	
2/13/80 Fld pltfs' NOTC OF APPEAL to 9th Cir C/A frm jdgmt ent 2-7-80.	

## CIVIL DOCKET—U.S. DISTRICT COURT

CV No. 78-3246

THE INTERNATIONAL LADIES GARMENT WORKERS UNION,  
 AFL-CIO, HERMAN DELGADO, RAMONA CORREA,  
 FRANCIS LABONTE, and MARIA MIRAMONTES, ON BEHALF  
 OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,  
 PLAINTIFFS

v.

JOSEPH SURECK, GRIFFITH [sic] B. BELL, LEONEL J. CAS-  
 TILLO and THE IMMIGRATION AND NATURALIZATION  
 SERVICE, DEFENDANTS

DATE	PROCEEDINGS
8/22/78	Fld complt. Issd sumons.
10/24/78	Fld Defts ANSWER to complt.
12/4/78	MIN ORD: crt ORDS cas consolidtd w/78-740-LEW
2/5/80	Fld Jdmnt in favr of defts & against pltfs, dismng pltfs' cmplnts (ENT 2-7-80)
2/13/80	Fld pltfs' NOTC OF APPEAL to 9th Cir C/A frm jdgmt ent 2-7-80



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DOCKET SHEET

Nos. 80-5035; 80-5454; 80-5152; 80-5153

THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION,  
AFL-CIO; HERMAN DELGADO; and RAMON [sic] CORREA,  
PLAINTIFFS/APPELLANTS

*vs.*

JOSEPH SURECK; GIL CLARIN; JAMES ROBINSON; FORTY  
UNNAMED AGENTS OF THE IMMIGRATION AND NATURAL-  
IZATION SERVICE; BENJAMIN R. CIVILETTI; LEONEL J.  
CASTILLO; and THE IMMIGRATION AND NATURALIZATION  
SERVICE, DEFENDANTS/APPELLEES

1982	FILINGS-PROCEEDINGS
July 15	ORDERED OPINION (ANDERSON) FILED & JUDG TO BE FILED & ENTD. -db-
July 15	Filed opinion—reversed & remanded. JS/34
July 15	FILED & ENTERED JUDGMENT. -db-
Sept 30	Filed in 80-5054, order (ANDERSON, NORRIS & MUECKE) the petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. -db-
Oct 22	Filed in 80-5054, order (ANDERSON) upon due consideration of alples' mtn for stay of the mandate pend- ing the filing, consideration & disposition by the Supreme Court of the United States of a petition for writ of cer- tiorari, such petition to be filed in the Clerk's Office of the U.S. Supreme Court on or before Nov. 8, 1982, it is ordered that the mtn for stay of mandate be, and the same is hereby granted.

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**1982**

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**FILINGS-PROCEEDINGS**

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Nov 9 Filed in 80-5054, order (ANDERSON) upon due consideration of aples mtn for stay of the mandate pending the filing, consideration & disposition by the U.S. Supreme Court of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the U.S. Supreme Court on or before Dec. 1, 1982, it is ordered that the mtn for stay of mandate be, and the same is hereby granted. -db-

Dec 8 Filed in 80-5035 order (Anderson) the motion for stay of mandate denied.

Dec 17 MANDATE ISSUED

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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No.: CV 78-0740-LEW(PX)

THE INTERNATIONAL LADIES GARMENT WORKERS UNION,  
AFL-CIO, HERMAN DELGARDO, RAMONA CORREA, GUAD-  
ALUPE RODRIGUEZ, and MARIA MIRAMONTES ON BEHALF  
OF ALL PERSONS SIMILARLY SITUATED, PLAINTIFFS

vs.

JOSEPH SURECK, GIL CLARIN, JAMES ROBINSON, GRIFFITH  
[sic] B. BELL, LEONEL J. CASTILLO and THE IMMIGRA-  
TION AND NATURALIZATION SERVICE, DEFENDANTS

---

FIRST AMENDED COMPLAINT

Plaintiffs complain and allege as follows:

1. This is a civil action for declaratory relief and in-  
junctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.  
The jurisdiction of this Court is invoked under 28 U.S.C.  
§§ 1331 and 1343, this being an action arising under the  
Fourth and Fifth Amendments to the United States Con-  
stitution and 42 U.S.C. § 1981. Additionally, the juris-  
diction of this Court is invoked under 8 U.S.C. §§ 1329  
and 1357.

2. Plaintiff International Ladies Garment Workers  
Union, AFL-CIO (hereafter ILGWU) is a labor organi-  
zation within the meaning of the National Labor Rela-  
tions Act. Its principal office and place of business in  
the Western United States is located in Los Angeles,  
California. The ILGWU has been certified as the ex-  
clusive representative of production and maintenance em-  
ployees at Southern California Davis Pleating Co. and  
at Mr. Pleat pursuant to Section 9 of the National Labor

Relations Act. The ILGWU also represents thousands of other garment workers, the vast majority of whom are of Latin ancestry who are employed in numerous shops throughout the Central Judicial District of California.

3. The ILGWU is suing in its representative capacity on behalf of its membership and pursuant to its obligations deriving from Section 9(a) of the National Labor Relations Act.

4. Plaintiff Herman Delgado was born in Puerto Rico and is, and at all times mentioned herein has been, a naturalized citizen of the United States. He is a full time employee of Southern California Davis Pleating Co. and has been so employed since September, 1975. He is a member of the ILGWU.

5. Plaintiff Ramona Correa is employed at Southern California Davis Pleating Co. and has been so employed continuously for over nineteen years. She is a citizen of the United States and is a member of the ILGWU.

6. Plaintiff Guadalupe Rodriguez is a citizen of the United States. He has been an employee at Mr. Pleat for over two years and is a member of the ILGWU.

7. Plaintiff Maria Miramontes was born in Mexico and has been a legal resident of the United States since 1944. She is an employee at Mr. Pleat and has been so employed for eighteen years. She is a member of the ILGWU.

8. Defendant Griffith B. Bell is Attorney General of the United States and is Chief Administrative Officer of the United States Justice Department, which department contains the Immigration and Naturalization Service. As Attorney General he is authorized by statute to control, direct, and supervise all employees and operations of the Immigration and Naturalization Service.

9. Defendant Leonel J. Castillo is Commissioner of Immigration and Naturalization. He is Chief Administrative Officer of the Immigration and Naturalization Service and, subject to the authority of the Attorney General, is authorized to control, direct, and supervise all

employees and operations of the Immigration and Naturalization Service.

Defendant Joseph Sureck is the District Director of the Immigration and Naturalization Service and has offices located at 300 North Los Angeles Street, Los Angeles, California. He is Chief Administrative Officer for all operations of the Immigration and Naturalization Service in the Southern California area. All of the actions complained of in this Complaint were performed under his direction.

11. Defendants Gil Clarin and James Robinson are officers and agents of the Immigration and Naturalization Service and participated in the January 4, 1977 raid at Southern California Davis Pleating Co.

12. Defendant Immigration and Naturalization Service (hereinafter INS) is an agency of the United States Government contained within the Department of Justice. The specific actions complained of herein were performed by agents of the INS under the direction and control of Attorney General Griffith B. Bell, Commissioner Leonel J. Castillo, and District Director Joseph Sureck.

13. Plaintiffs bring this action on behalf of themselves and as a class action on behalf of others similarly situated pursuant to Rule 23 (a) (b) of the Federal Rules of Civil Procedure. The class is defined as all persons of Latin ancestry or of a Spanish surname who are, will be or have been employed in the garment industry or in any other industry in the Central Judicial District of California.

14. The persons who constitute the class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the entire class; the claims of the Plaintiffs are typical of the claims of the entire class and the Plaintiffs will fairly and adequately protect the interests of the entire class.

15. Southern California Davis Pleating Co. is located at 1100 East 10th Street, Los Angeles, California. It employs some 500 employees, in excess of ninety per cent

of whom are of Latin ancestry and have Spanish surnames. Among its employees are Plaintiffs Herman Delgado and Ramona Correa.

16. Southern California Davis Pleating Co. is a garment manufacturing plant. Most of the some 500 employees work at various individual machines in the manufacture of pleats. Their machines and the individual employees who work at those machines are generally arranged in rows throughout the plant.

17. Early in the morning on January 4, 1977 a large number of agents of the Immigration and Naturalization Service suddenly appeared on the premises of the Southern California Davis Pleating Company. The Plaintiffs are informed and believe and on that basis allege that there were from 30 to 40 agents who appeared at that time on that date. Those agents sealed off all entrances and exits to the building and engaged in a massive and systematic interrogation of those employees employed at Southern California Davis Pleating Company who appeared to be of Latin origin.

18. On January 4, 1977 virtually all Latin appearing employees among the some 500 employees in the Company, were interrogated about their citizenship. Those employees who indicated that they were not citizens of the United States were required to produce papers establishing that they were legal residents of the United States at that very moment. Those who did not have such papers with them were removed to a particular portion of the premises, were ultimately handcuffed and arrested by the INS agents. Many of those persons who were handcuffed were treated very roughly. In excess of 70 employees who were unable to produce immediate and tangible evidence of their legal resident, were arrested by the Agents of the INS on that morning.

19. The Plaintiffs are informed and believe and thereon allege that many of the Southern California Davis Pleating Company employees who indicated that they were citizens of the United States were intensively interro-

gated in several areas by the INS agents including questions about their current resident, previous places of residences, where they previously attended various schools, and the names of those schools.

20. Although a few individual employees ran toward the back of the plant when the INS agents entered, the great majority of the employees remained in their work positions upon entry of the Defendants. They did nothing unusual or suspicious to justify the systematic stops and interrogations that took place. Generally, these employees were dressed normally and were simply doing their work when they were approached and questioned by the INS agents. The only basis employed by the Defendants for determining which employees to question was whether or not they appeared to be, from their features, facial characteristics and their clothing, of Latin origin.

21. Plaintiff Ramona Correa, who is and appears to be of Latin ancestry, was among those approached and interrogated by agents of the INS on January 4, 1977 despite her having done nothing unusual or suspicious to justify such harassment.

22. The raid at Southern California Davis Pleating Company on January 4, 1977 occurred under the ostensible authority of a search warrant. A true and correct copy of that search warrant and of the affidavit for that search warrant is attached hereto as Exhibit "A" and incorporated by reference as though fully set forth herein.

23. A true and correct copy of the return to that search warrant revealing that 78 individuals were seized as evidence, is attached hereto as Exhibit "B" and incorporated hereby by reference as though fully set forth herein.

24. The search warrant which was the ostensible basis for the raid on January 4, 1977 was violative of the Fourth and Fifth Amendments to the Constitution of the United States of America, was an invalid search warrant and provided no legal basis for the intrusion upon the



privacy of the Plaintiffs that occurred in the instant case as alleged herein.

25. On or about September 27, 1977, some 30 to 48 agents of the INS returned to the premises of the Southern California Davis Pleating Company and again engaged in a massive interrogation of the some 500 employees employed at that plant.

26. The September 27, 1977 raid at Southern California Davis Pleating Co. occurred under the ostensible authority of a search warrant, a true and correct copy of which is attached hereto as Exhibit "C" and incorporated herein by reference as though set forth at length. A true and correct copy of the return to that search warrant revealing that 30 individuals were seized as evidence is attached hereto as Exhibit "D" and incorporated herein by reference as though set forth at length.

27. The search warrant which was the ostensible basis for the raid of September 27, 1977, was violative of rights guaranteed Plaintiffs by the Fourth and Fifth Amendments to the Constitution of the United States of America, was an invalid search warrant and provided no legal basis for the intrusion upon the privacy of the Plaintiffs that occurred as alleged herein.

28. In this second raid, INS agents were observed to rush through the side door in the shipping department, and walk right by one of the owners of the Company, Mr. Davis, without stopping. The agents came in other entrances as well and immediately began interrogating the employees as they were working at their machines, proceeding in sequence up and down the rows of employees seated at their machines.

29. Once again, a few employees ran to the back of the plant when the agents entered but the great majority did nothing suspicious, but simply remained at their work stations, committed no crime, but were systematically interrogated by the some 30 to 40 agents who entered the plant.

30. In the raid of September 27, 1977 as in the earlier raid, it appeared that the only employees who were skipped over were those who appeared to be caucasian or black. All other employees who appeared to be of Latin origin, were interrogated on that basis.

31. In that raid as in the first one, the Defendants engaged in a pattern of asking first about the citizenship of the particular employee and then following up with regard to some of the employees who responded that they were not United States citizens with further questions relative to details of their residence and where they attended school.

32. As in the first raid, the employees who indicated that they were not citizens of the United States, were asked to produce documentation of legal residence on the spot. Those who could not, were immediately taken to a certain part of the plant, and were eventually arrested and taken from the premises by the Defendants.

33. In the second raid at the Southern California Davis Pleating Company, the Plaintiff Herman Delgado was approached by an agent of the Immigration and Naturalization Service and was interrogated. He was questioned about his citizenship. When he responded that he was a United States citizen, he was asked in what country he was born. When he responded that he was a naturalized citizen originally from Puerto Rico, he was asked the city in Puerto Rico from which he originated.

34. The agent of the INS who questioned the Plaintiff Delgado then spoke to another INS agent in front of Mr. Delgado so that he could hear and told the other agent that Mr. Delgado's English was too good but that next time "they'd check him out."

35. As a result of the pattern and practice of interrogation of employees of Latin extraction, which occurred as described hereinabove, and as a result of the arrest of numerous persons who were unable to immediately provide the INS with documentation of their legal residence, the Plaintiff Delgado is fearful that commensurate

with the threat of the agent who interrogated him, the Defendants will return at any time, will subject him to harassment, interrogation and/or will arrest him in the event that he is unable to produce papers on the spot establishing that he is a United States citizen.

36. On October 3, 1977, following the pattern and practice evidenced by the raids at Southern California Davis Pleating Co., agents of the INS appeared at the premises of Mr. Pleat, 1350 Margo Street, Los Angeles, California. These agents sealed off the exits from the factory and engaged in massive and systematic interrogation of Mr. Pleat employees who appeared to be of Latin origin.

37. The agents conducting this raid did not present a search warrant nor did they ask permission of anyone before conducting their sweep of the factory. Plaintiffs are informed and believe and on that basis allege that the intrusion of October 3, 1977 occurred without any search warrant.

38. As in the other raids the INS agents systematically questioned employees of Latin ancestry regardless of whether they behaved suspiciously or not.

39. As a result of this raid approximately 70 persons, all of Latin extraction, were arrested and taken away because they were unable to produce immediate proof of lawful residence.

40. Among those arrested at Mr. Pleat was Guadalupe Rodriguez who was arrested having informed INS agents that he was a natural born United States citizen.

41. After being arrested and taken to an INS facility Mr. Rodriguez was informed by an agent of the INS that he could go to court or to Tijuana. He was also informed that if he wished to go to court he would have to spend about a week in jail before he could see a judge. Faced with this choice, Mr. Rodriguez agreed to be taken to Tijuana and was, in fact, taken across the border that day.

42. As a result of the pattern and practice of interrogation and arrest of employees of Latin extraction Plaintiff Guadalupe Rodriguez is fearful that he will once again be unlawfully arrested and deported for no other reason than his Latin ancestry.

43. The individual Plaintiffs and most of the Plaintiff class are aware that the Defendants have been engaging in a pattern and practice of raiding manufacturing plants and other plants within the garment industry on virtually a daily basis in the same manner as occurred at Southern California Davis Pleating Company and at Mr. Pleat. These raids are plainly and indiscriminately directed at persons of Latin origin, a great majority of which agents of the INS have no reason to suspect of having engaged in any criminal activity or in any other illegal conduct, with the result that the individual Plaintiffs and members of Plaintiff class are fearful that they will in the future be subjected to unjustified harassment, questioning and arrest at the hands of the Defendants, all in derogation of their Constitutional rights.

44. The Defendants have generally within the last two or three years engaged and continue to engage in a pattern and practice of raiding establishments within the garment industry in Southern California through the use of ostensible search warrants which are in precisely the same form as Exhibit "A" and "C" to this Complaint, which uniformly refer to persons as "fruits and instrumentalities and evidence of violations of Title 8 United States Code, Sections 1324 and 1325," and which uniformly are based upon defective affidavits stating only that the affiant, an INS officer, or some other INS officer who informed the affiant, spoke to certain "illegal aliens" who stated that they believed, based on general conversations with other employees in a particular establishment, that those other employees are also illegal aliens. The affidavits contain no specific indication of the basis upon which the informant concluded that his or her co-employees were illegal aliens.

45. The Defendants within the last two or three years have engaged in and continue to engage in, a pattern and practice, where they utilize search warrants which are in the form of the warrant attached hereto as Exhibit "A", of engaging in sweeps through factories such as occurred in the second raid at Southern California Davis Pleating Company by simply entering the premises en masse unless they are specifically advised by the owners or manager of the premises that they may not remain on the premises without a search warrant.

46. Regardless of whether the Defendants utilize the search warrant device described hereinabove or enter without a warrant, they engage in massive interrogations and arrests as has been described hereinabove, without ever obtaining any consent for such intrusion and interrogations on the part of the employees who are interrogated.

47. By engaging in the above described raids at Southern California Davis Pleating Company, and at Mr. Pleat, Defendants have violated the rights of the Plaintiffs against unreasonable searches and seizures and have violated the due process and privacy rights of the Plaintiffs. Unless injunctive relief as prayed for is granted, the Defendants will continue to engage in further and perhaps more extensive violations of the constitutional rights of the Plaintiff class.

48. There is no adequate remedy at law to prevent further violations of the constitutional rights of the Plaintiffs and the Plaintiffs will be irreparably injured unless injunctive relief as prayed for is provided as a result of the violation of their constitutional rights.

49. The Plaintiffs seek declaratory relief from this Court that the above-described INS raids are unlawful and violative of constitutional guarantees against unreasonable searches and seizures and violative of due process of law and that the type of warrant and affidavit employed invalidly are general in nature without reference to specific individuals and without reasonable cause

to support any intrusion upon the rights of the Plaintiffs. WHEREFORE, the Plaintiffs pray as follows:

1. That this Court issue a declaratory judgment declaring that the warrant and affidavit employed as alleged hereinabove are unlawful and that the pattern and practice of indiscriminately stopping and interrogating employees of Latin origin is unlawful;

Further, that this Court issue a declaratory judgment that the Defendants may not, with or without a warrant for specific individuals, engage in a pattern of stopping or questioning the work force in a plant where the individuals questioned have done nothing unlawful or suspicious and where the warrant does not specifically name or describe the individuals stopped or questioned.

2. That this Court issue a permanent injunction against the use of search warrants which are not particularized with respect to the individuals described, and which are issued without reasonable cause to believe that any criminal conduct or violation of law has occurred, and further, for an order enjoining the Defendants from arresting, detaining, stopping and interrogating or otherwise interfering with the rights of the Plaintiffs ostensibly because of their Latin appearance, unless the Defendants possess a valid warrant and search or arrest with regard to the individual plaintiffs, have probable cause to search or arrest individual plaintiffs without a warrant, or have reasonable suspicion based on specific irrefutable facts that the plaintiffs are aliens unlawfully in the United States;

3. For a preliminary injunction against the use of search warrants which are not particularized with respect to the individuals described, and which are issued without reasonable cause to believe that any criminal conduct or violation of law has occurred, and further, for an order enjoining the Defendants from arresting, detaining, stopping and interrogating or otherwise interfering with the rights of the plaintiffs ostensibly because of

their Latin appearance, unless the Defendants possess a valid warrant to search or arrest with regard to the individual plaintiffs, have probable cause to search or arrest individual plaintiffs without a warrant, or have reasonable suspicion based on specific irrefutable facts that the plaintiffs are aliens unlawfully in the United States;

4. For such other and further relief as to this Court seems just and proper.

DATED: June 9, 1978

LEVY, KOSZDIN, GOLDSCHMID  
& SROLOFF

By: /s/ Henry Fenton  
HENRY R. FENTON



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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78 3246 WMB (GX)

THE INTERNATIONAL LADIES GARMENT WORKERS UNION,  
AFL-CIO, HERMAN DELGADO, RAMONA CORREA, FRAN-  
CIS LAVONTE, and MARIA MIRAMONTES, ON BEHALF OF  
THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,  
PLAINTIFFS

*vs.*

JOSEPH SURECK, GRIFFITH [sic] B. BELL, LEONEL J. CAS-  
TILLO and THE IMMIGRATION AND NATURALIZATION  
SERVICE, DEFENDANTS

---

COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF

Plaintiffs complain and allege as follows:

1. This is a civil action for declaratory relief and in-  
junctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.  
The jurisdiction of this Court is invoked under 28 U.S.C.  
§§ 1331 and 1343, this being an action arising under the  
Fourth and Fifth Amendments to the United States Con-  
stitution and 42 U.S.C. § 1981.

2. Plaintiff, INTERNATIONAL LADIES GARMENT  
WORKERS UNION, AFL-CIO (hereinafter ILGWU) is  
a labor organization within the meaning of the National  
Labor Relations Act. Its principal office and place of  
business in the Western United States is located in Los  
Angeles, California. The ILGWU has been certified as  
the exclusive representative of production and mainte-  
nance employees at Southern California Davis Pleating  
Co. and at Mr. Pleat pursuant to Section 9 of the Na-

tional Labor Relations Act. The ILGWU also represents thousands of other garment workers, the vast majority of whom are of Latin ancestry who are employed in numerous shops throughout the Central Judicial District of California.

3. The ILGWU is suing in its representative capacity in behalf of its members and workers it represents as exclusive bargaining representative pursuant to the Labor-Management Relations Act, 1947 (29 U.S.C. §§ 141 *et seq.*)."

4. Plaintiff, HERMAN DELGADO, was born in Puerto Rico and is, and at all times mentioned herein has been, a naturalized citizen of the United States. He is a full time employee of Southern California Davis Pleating Co. and has been so employed since September, 1975. He is a member of the ILGWU.

5. Plaintiff, RAMONA CORREA, is employed at Southern California Davis Pleating Co. and has been so employed continuously for over nineteen years. She is a citizen of the United States and is a member of the ILGWU.

6. Plaintiff, FRANCIS LAVONTE, was born in Mexico and has been a legal resident of the United States for eighteen years. She is an employee of Southern California Davis Pleating Co. and is a member of the ILGWU.

7. Plaintiff, MARIA MIRAMONTES, was born in Mexico and has been a legal resident of the United States since 1944. She is an employee at Mr. Pleat and has been so employed for eighteen years.

8. Defendant, GRIFFITH B. BELL, is Attorney General of the United States and is Chief Administrative Officer of the United States Justice Department, which department contains the Immigration and Naturalization Service. As Attorney General he is authorized by statute to control, direct, and supervise all employees and operations of the Immigration and Naturalization Service.

9. Defendant, LEONEL J. CASTILLO, is Commissioner of Immigration and Naturalization. He is Chief

Administrative Officer of the Immigration and Naturalization Service and, subject to the authority of the Attorney General, is authorized to control, direct, and supervise all employees and operations of the Immigration and Naturalization Service.

10. Defendant, JOSEPH SURECK, is the District Director of the Immigration and Naturalization Service and has offices located at 300 North Los Angeles Street, Los Angeles, California. He is Chief Administrative Officer of all operations of the Immigration and Naturalization Service in the Southern California area. All of the actions complained of in this complaint were performed under his direction.

11. Defendant, IMMIGRATION AND NATURALIZATION SERVICE, (hereinafter INS) is an agency of the United States Government contained within the Department of Justice. The specific actions complained of herein were performed by agents of the INS under the direction and control of Attorney General Griffith B. Bell, Commissioner Leonel J. Castillo, and District Director Joseph Sureck.

12. Plaintiffs bring this action on behalf of themselves and a class action on behalf of others similarly situated pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. The class is defined as all persons of Latin ancestry or of a Spanish surname who are, will be or have been employed in the garment industry or in any other industry in the Central Judicial District of California.

13. The persons who constitute the class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the entire class; the claims of the Plaintiffs are typical of the claims of the entire class and the Plaintiffs will fairly and adequately protect the interests of the entire class.

14. Southern California Davis Pleating Co. is located at 1100 East 10th Street, Los Angeles, California. It employs some 500 employees, in excess of ninety percent

of whom are of Latin ancestry and have Spanish surnames. Among its employees are Plaintiffs, HERMAN DELGADO, RAMONA CORREA, and FRANCIS LAVONTE.

15. Early in the morning on January 4, 1977, a large number of agents of the Immigration and Naturalization Service suddenly appeared on the premises of the Southern California Davis Pleating Company. The Plaintiffs are informed and believe and on that basis allege that there were from 30 to 40 agents who appeared at that time on that date. Those agents sealed off all entrances and exits to the building and engaged in a massive and systematic interrogation of those employees employed at Southern California Davis Pleating Company who appeared to be of Latin origin.

16. On January 4, 1977, virtually all Latin appearing employees among the some 500 employees in the Company, were interrogated about their citizenship. At no time prior to this questioning did the INS agents inform any of the employees of their right to remain silent or of their other rights under the Fifth Amendment.

17. The plaintiffs are informed and believe and thereon allege that many of the Southern California Davis Pleating Company employees who indicated that they were citizens of the United States were further interrogated by the INS agents regarding matters such as their current residence, previous places of residence, and where they attended school.

18. Although a few individual employees ran toward the back of the plant when the INS agents entered, the great majority of the employees remained in their work positions upon entry of the Defendants. They did nothing unusual or suspicious to justify the systematic stops and interrogations that took place. Generally, these employees were dressed normally and were simply doing their work when they were approached and questioned by the INS agents. The only basis employed by the Defendants for determining which employees to question was whether

or not they appeared to be, from their features, facial characteristics and their clothing, of Latin origin.

19. As a result of these unlawful interrogations, some 78 employees who were unable to provide immediate proof of their right to be in this country were formally arrested and were handcuffed and removed from the premises.

20. The raid at Southern California Davis Pleating Company on January 4, 1977, occurred under the ostensible authority of a search warrant. A true and correct copy of that search warrant and of the affidavit for that search warrant is attached hereto as Exhibit "A" and incorporated by reference as though fully set forth herein.

21. A true and correct copy of the return to that search warrant revealing that 78 individuals were seized as evidence, is attached hereto as Exhibit "B" and incorporated hereby by reference as though fully set forth herein.

22. The search warrant which was the ostensible basis for the raid on January 2, 1977, was violative of the Fourth Amendment to the Constitution of the United States of America, was an invalid search warrant and provided no legal basis for the intrusion upon the privacy of the Plaintiffs that occurred in the instant case as alleged herein.

23. On or about September 27, 1977, some 30 to 40 agents of the INS returned to the premises of the Southern California Davis Pleating Company and again engaged in a massive interrogation of the some 500 employees employed at that plant.

24. The September 27, 1977 raid at Southern California Davis Pleating Co. occurred under the ostensible authority of a search warrant, a true and correct copy of which is attached hereto as Exhibit "C" and incorporated herein by reference as though set forth at length. A true and correct copy of the return to that search warrant revealing that 30 individuals were seized as evi-

dence is attached hereto as Exhibit "D" and incorporated herein by reference as though set forth at length.

25. The search warrant which was the ostensible basis for the raid of September 27, 1977, was violative of rights guaranteed Plaintiffs by the Fourth Amendment to the Constitution of the United States of America, was an invalid search warrant and provided no legal basis for the intrusion upon the privacy of the Plaintiffs that occurred as alleged herein.

26. In this second raid, as in the first, INS agents were observed sealing off the entrances and exits of the factory and thereafter proceeding to interrogate employees as they were working at their machines, proceeding in sequence up and down the rows of employees seated at their work stations. Again, no employees were informed of their Constitutional rights prior to being questioned.

27. Once again, a few employees ran to the back of the plant when the agents entered but the great majority did nothing suspicious, but simply remained at their work stations, committed no crime, but were systematically interrogated by the same 30 to 40 agents who entered the plant.

28. In the raid of September 27, 1977 as in the earlier raid, it appeared that for the most part the only employees who were skipped over were those who appeared to be caucasian or black. Almost all employees who appeared to be of Latin origin, were interrogated on that basis.

29. Plaintiff, RAMONA CORREA, who is and appears to be of Latin ancestry, was among those approached and interrogated by agents of the INS on September 27, 1977, despite her having done nothing unusual or suspicious to justify such harrassment.

30. In the second raid at the Southern California Davis Pleating Company, the Plaintiff, HERMAN DELGADO, was approached by an agent of the Immigration and Naturalization Service and was interrogated. He

was questioned about his citizenship. When he responded that he was a United States citizen, he was asked in what country he was born. When he responded that he was a naturalized citizen originally from Puerto Rico, he was asked the city in Puerto Rico from which he originated.

31. The agent of the INS who questioned the Plaintiff, DELGADO, then spoke to another INS agent in front of MR. DELGADO so that he could hear and told the other agent that MR. DELGADO's English was too good but that next time "they'd check him out."

32. As a result of the pattern and practice of interrogation of employees of Latin extraction, which occurred as described hereinabove, and as a result of the arrest of numerous persons who were unable to immediately provide the INS with documentation of their legal residence, the Plaintiff, DELGADO, is fearful that commensurate with the threat of the agent who interrogated him, the Defendants will return at any time, will subject him to harrassment, interrogation and/or will arrest him in the event that he is unable to produce papers on the spot establishing that he is a United States citizen.

33. On October 3, 1977, following the pattern and practice evidenced by the raids at Southern California Davis Pleating Co., agents of the INS appeared at the premises of Mr. Pleat, 1350 Margo Street, Los Angeles, California. These agents sealed off the exits from the factory and engaged in massive and systematic interrogation of Mr. Pleat employees, including Plaintiff, MARIA MIRAMONTES, who appeared to be of Latin origin.

34. The agents conducting this raid did not present a search warrant nor did they ask permission of anyone before conducting their sweep of the factory. Plaintiffs are informed and believe and on that basis allege that the intrusion of October 3, 1977 occurred without any search warrant.



35. As in the other raids the INS agents systematically questioned employees of Latin ancestry regardless of whether they behaved suspiciously or not.

36. As a result of this raid, approximately 70 persons, all of Latin extraction, were arrested and taken away because they were unable to produce immediate proof of lawful residence.

37. The individual Plaintiffs and members of the Plaintiff class are aware that the defendants have been engaging in a pattern and practice of raiding manufacturing plants and other plants within the garment industry on virtually a daily basis in the same manner as occurred at Southern California Davis Pleating Company and at Mr. Pleat. These raids are plainly and indiscriminately directed at persons of Latin origin, a great majority of which agents of the INS have no reason to suspect of having engaged in any criminal activity or in any other illegal conduct, with the result that the individual Plaintiffs and members of Plaintiff class are fearful that they will in the future be subjected to unjustified harrassment, questioning and arrest at the hands of the Defendants, all in derogation of their Constitutional rights.

38. The Defendants have generally within the last two or three years engaged and continue to engage in a pattern and practice of raiding establishments within the garment industry in Southern California through the use of ostensible search warrants which are in precisely the same form as Exhibit "A" and "C" to this Complaint, which uniformly refer to persons as "fruits and instrumentalities and evidence of violations of Title 8 United States Code, Sections 1324 and 1325," and which uniformly are based upon defective affidavits stating only that the affiant, an INS officer, or some other INS officer who informed the affiant, spoke to certain "illegal aliens" who stated that they believed, based on general conversations with other employees in a particular establishment, that those other employees were also illegal aliens. The

affidavits contained no specific indication of the basis upon which the informant concluded that his or her co-employees were illegal aliens, nor any information showing the reliability of the informant.

39. Plaintiffs are informed and believe and thereon allege that Defendants have also within the last two or three years engaged and continue to engage in a pattern and practice of raiding establishments in a manner similar to that employed at Southern California Davis Pleating Co. after having obtained the consent of the owner of the target factory.

40. These raids are also conducted in violation of Plaintiffs Fourth and Fifth Amendment rights and the purported consent of the factory owner does not constitute a valid waiver of these constitutional guarantees.

41. Because the above-described conduct of Defendants occurs at the work place, the members of Plaintiff ILGWU who are also members of Plaintiff class, look to the union for the protection and vindication of their rights. Moreover, Defendant's pattern and practice of subjecting employees to massive interrogations, pursuant either to warrant or an employer's consent, affects the conditions of employment of those employees, undermines the members faith in the ability of Plaintiff union to protect their rights, and harms Plaintiff ILGWU in its ability to represent these employees and to organize other employees.

42. Regardless of whether the Defendants utilize the search warrant device described above or enter without a warrant pursuant to a factory owner's permission, they engage in massive interrogations and arrests as has been described above, without ever obtaining any valid consent for such intrusion and interrogation on the part of the employees who are interrogated.

43. By engaging in the above-described conduct the Defendants have violated and continue to violate the rights of Plaintiffs against unreasonable search and seizure and against self incrimination and their right to due process and privacy. Unless injunctive relief as

prayed for is granted, the Defendants will continue to engage in further and perhaps more extensive violations of the constitutional rights of the Plaintiff class.

44. There is no adequate remedy at law to prevent further violations of the constitutional rights of the Plaintiffs and the Plaintiffs will be irreparably injured unless injunctive relief as prayed for is provided as a result of the violation of their constitutional rights.

WHEREFORE, the Plaintiff prays as follows:

1. That this Court issue a declaratory judgment declaring that surveys of the immigration status of the employees of a business establishment are unlawful unless conducted pursuant to a valid search warrant or the consent of the persons to be searched. That the warrant and affidavits employed as alleged hereinabove, are unlawful, that an employer may not lawfully consent to a search of his employees and that the pattern and practice of indiscriminately stopping and interrogating employees of Latin origin is unlawful.

Further, that this Court issue a declaratory judgment that the Defendants may not, with or without a warrant, engage in a pattern of stopping or questioning the work force in a plant where the individuals questioned have done nothing unlawful or suspicious and where the warrant does not specifically name or describe the individuals stopped or questioned.

2. That this Court issue a permanent injunction against the use of search warrants which are not particularized with respect to the individuals described, and which are issued without reasonable cause to believe that any criminal conduct or violation of law has occurred, and further, for an order enjoining the Defendants from arresting, detaining, stopping and interrogating or otherwise interfering with the rights of the Plaintiffs and the class they represent because of their Latin appearance, unless the Defendants possess a valid warrant to search or arrest with regard to the individual Plaintiffs, have

probable cause to search or arrest individual Plaintiffs without a warrant, or have reasonable suspicion based on specific irrefutable facts that the Plaintiffs are aliens unlawfully in the United States.

3. That this Court issue a preliminary injunction against the use of search warrants which are not particularized with respect to the individuals described, and which are issued without reasonable cause to believe that any criminal conduct or violation of law has occurred, and further, for an order enjoining the Defendants from arresting, detaining, stopping and interrogating or otherwise interfering with the rights of the Plaintiffs and the class they represent because of their Latin appearance, unless the Defendants possess a valid warrant to search or arrest with regard to the individual Plaintiffs, have probable cause to search or arrest individual Plaintiffs without a warrant, or have reasonable suspicion based on specific irrefutable facts that the Plaintiffs are aliens unlawfully in the United States.

4. That this Court issue a permanent injunction against the practice of surveying the employees of business establishments pursuant only to the consent of the employer and without the consent of the employees themselves.

5. That this Court issue a preliminary injunction against the practice of surveying the employees of business establishments pursuant only to the consent of the employer and without the consent of the employees themselves.

6. That this Court issue a preliminary injunction against the conduct of surveying the work force of a business establishment without first informing the employees to be interrogated of their Fifth Amendment rights.

7. That this Court issue a preliminary injunction against the practice of surveying the work force of a business establishment without first informing the em-

ployees to be interrogated of their Fifth Amendment rights.

8. For such other and further relief as this Court finds just and proper.

DATED: August 15, 1978.

LEVY & GOLDMAN

By: /s/ Henry Fenton  
HENRY R. FENTON

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

No. CV 78-0740-LEW(PX)

THE INTERNATIONAL LADIES GARMENT WORKERS UNION,  
AFL-CIO, ET AL., PLAINTIFFS

v.

JOSEPH SURECK, ET AL., DEFENDANTS

ANSWER TO AMENDED COMPLAINT

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Defendants, in answer to the amended complaint of plaintiffs, hereby admit, deny, and allege as follows:

1. Paragraphs 1, 3, and 13 are conclusions of law and require no response; however, if deemed to be statements of fact, they are denied.

2. Deny paragraphs 2, 4, 5, 7, 14, 15, 16, 21, 33, 34, 35, 39, 40, 41, and 42 for insufficient information or knowledge.

3. Deny paragraph 6 and allege, on information and belief, that plaintiff Guadalupe Rodriguez is not a United States citizen but is an alien unlawfully in the United States.

4. As to paragraphs 8 and 9, admit that Griffin Bell is the Attorney General of the United States and Leonel Castillo is the Commisisoner of the Immigration and Naturalization Service. The remainder of said paragraphs are conclusions of law and require no response; however, if deemed to be a statement of fact, they are denied.

5. Deny paragraphs 10, 17, 18, 19, 20, 24, 27, 28, 29, 30, 31, 32, 38, 43, 44, 45, 46, 47, and 48.

6. Admit paragraph 11, except that there was no raid on January 4, 1978. Agents entered by valid search warrant.

7. As to paragraph 12, defendants admit that INS is an agency within the United States Department of Justice; deny the remainder of said paragraph.

8. Paragraph 22 is a conclusion of law and requires no response; however, if deemed to be a statement of fact, it is denied, except that defendants admit that a search warrant was used on January 4, 1977 to gain entry to Southern California Davis Pleating Company.

9. As to paragraph 23, defendants allege that 78 aliens illegally in the United States were apprehended at Southern California Davis Pleating Company on January 4, 1977.

10. As to paragraphs 25 and 26, defendants admit that INS agents went to Southern California Davis Pleating Company on September 27, 1977 and deny the remainder of said paragraphs.

11. As to paragraphs 36 and 37, defendants allege that INS agents entered Mr. Pleat on October 3, 1977 with consent and deny the remainder of said paragraphs.

12. Defendants admit that paragraph 49 sets forth that which plaintiffs pray for and deny the Court has jurisdiction to grant such relief.

13. Defendants deny each and every allegation of plaintiffs' amended complaint which has not expressly been admitted, denied, or qualified herein.

14. Defendants deny that plaintiffs are entitled to the relief prayed for or to any relief whatsoever.

### FIRST AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over the subject matter of the instant action inasmuch as there is no case or controversy, plaintiffs lack standing, and no proper jurisdictional basis is alleged.



## SECOND AFFIRMATIVE DEFENSE

The amended complaint fails to state a claim upon which relief can be granted.

## THIRD AFFIRMATIVE DEFENSE

No service has been made on James Robinson. Therefore, the action should be dismissed as to him for lack of in personam jurisdiction and for insufficiency of process.

WHEREFORE, defendants pray that the Court deny plaintiffs the relief they seek, tax them for all costs incurred in this action, and award to defendants such other relief as is just and reasonable.

DATED: This 15 day of September, 1978.

ANDREA SHERIDAN ORDIN  
United States Attorney

FREDERICK M. BROSI, JR.  
Assistant United States Attorney  
Chief, Civil Division

CAROLYN M. REYNOLDS  
Assistant United States Attorney

/s/ Lawrence B. Gotlieb  
LAWRENCE B. GOTLIEB  
Assistant United States Attorney  
Attorneys for Defendants

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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No. CV 78-3246-LEW (GX)

THE INTERNATIONAL LADIES GARMENT WORKERS UNION,  
AFL-CIO, HERMAN DELGADO, RAMONA CORREA, FRANCIS  
LAVONTE, AND MARIA MIRAMONTES, ON BEHALF OF  
THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,  
PLAINTIFFS

v.

JOSEPH SURECK, GRIFFIN B. BELL, LEONEL J. CASTILLO  
AND THE IMMIGRATION AND NATURALIZATION SERVICE,  
DEFENDANTS

---

ANSWER TO COMPLAINT

Defendants in answer to the complaint of plaintiffs  
hereby admit, deny, and allege as follows:

1. Paragraphs 1, 3 and 12 are conclusions of law and  
require no response; however, if deemed to be statements  
of fact; they are denied.

2. Deny paragraphs 2, 4, 5, 6, 7, 13, 14, 29, 30, 31, 32,  
36 and 41 for insufficient information or knowledge.

3. As to paragraphs 8 and 9, admit that Griffin Bell is  
the Attorney General of the United States and Leonel  
Castillo is the Commissioner of the Immigration and Nat-  
uralization Service. The remainder of said paragraphs  
are conclusions of law and require no response; however,  
if deemed to be statements of fact, they are denied.

4. Deny paragraphs 10, 15, 16, 17, 18, 19, 22, 25, 26,  
27, 28, 35, 37, 38, 40, 42, 43 and 44.

5. As to paragraph 11, defendants admit that INS is  
an agency within the United States Department of Jus-  
tice; deny the remainder of said paragraph.

6. Paragraph 20 is a conclusion of law and requires no response; however, if deemed to be a statement of fact, it is denied, except that defendants admit that a search warrant was used on January 4, 1977 to gain entry to Southern California Davis Pleating Company.

7. As to paragraph 21, defendants allege that 78 aliens illegally in the United States were apprehended at Southern California Davis Pleating Company on January 4, 1977.

8. As to paragraphs 23 and 24, defendants allege that INS agents went to Southern California Davis Pleating Company on September 27, 1977 and deny the remainder of said paragraphs.

9. As to paragraphs 33 and 34, defendants allege that INS agents entered Mr. Pleat on October 3, 1977 with consent and deny remainder of said paragraphs.

10. As to paragraph 39, defendants allege that entry into a factory is made only after consent to enter is given or a search warrant has been issued; deny the remainder of said paragraph.

11. Defendants deny each and every allegation of plaintiffs' complaint which has not expressly been admitted, denied, or qualified herein.

12. Defendants deny that plaintiffs are entitled to the relief prayed for or to any relief whatsoever.

#### FIRST AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over the subject matter of the instant action inasmuch as there is no case or controversy, plaintiffs lack standing, and no proper jurisdictional basis is alleged.

#### SECOND AFFIRMATIVE DEFENSE

The complaint fails to state any claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Any claims in the action are barred by laches.

WHEREFORE, defendants pray that the Court deny plaintiffs the relief they seek, tax them for all costs incurred in this action, and award to defendants such other further relief as is just and reasonable.

DATED: This 24th day of October, 1978.

ANDREA SHERIDAN ORDIN  
United States Attorney  
FREDERICK M. BROSIQ, JR.  
Assistant United States Attorney  
Chief, Civil Division  
CAROLYN M. REYNOLDS  
Assistant United States Attorney

/s/ Lawrence B. Gotlieb  
LAWRENCE B. GOTLIEB  
Assistant United States Attorney  
Attorneys for Defendants

## U.S. DEPARTMENT OF JUSTICE

## Immigration and Naturalization Service

THE LAW OF SEARCH AND SEIZURE  
FOR IMMIGRATION OFFICERS

M-69

(Rev. June 1979)

## I. Sources of Authority

The authority exercised by the employees of the Immigration and Naturalization Service stems from four principal sources. They are: (1) United States Constitution; (2) statutes enacted by Congress, chiefly the Immigration and Nationality Act of 1952, as amended (INA), 8 U.S.C. 1101 et seq.; (3) published administrative regulations implementing those statutes, 8 C.F.R. 1 et seq.; and (4) interpretations of the Constitution, laws, and regulations by the courts, the Board of Immigration Appeals, and the Service.

The Attorney General is charged by statute with the administration and enforcement of the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens. He is authorized to delegate to employees of the Service or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him by the Act, and he may impose such duties on any employee of the United States, with the consent of the head of the department or agency under whose jurisdiction the employee is serving.<sup>1</sup> By regulation the Attorney General has delegated administrative enforcement authority to the Commissioner of Immigration and Naturalization.<sup>2</sup> By regulation the Commissioner in turn has redelegated authority to immigration officers. The term "immigration officer" includes, among others, immigration inspectors, Border

Patrol agents, and investigators.<sup>3</sup> (See Section II. Definitions below.)

## II. Definitions

*Arrest*: Actual or constructive seizure or detention of the person performed with the intention to effect an arrest and so understood by the person detained.

*Border search*: Search made at the border or its functional equivalent. Immigration officers do not need probable cause to make a border search of any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States. They do not need probable cause to search, at the border or functional equivalent, any person seeking admission into the United States if they have reason to suspect that grounds exist for exclusion from the United States which would be disclosed by such search.

### *Degrees of suspicion:*

1. *Mere suspicion*—at the border or its functional equivalent, all that an immigration officer needs to justify a search and comply with the requirements of the Fourth Amendment. This is supplied by the mere fact that the person is attempting to enter the United States from abroad and may reasonably be required to demonstrate that he and his belongings are entitled to enter the United States.

2. *Reasonable suspicion of alienage*—the degree of suspicion that an immigration officer must have before he may constitutionally *stop and question* a pedestrian or a person in a factory, restaurant, or similar establishment. This suspicion must be based on more than ethnic physical appearance, e.g. Mexican or Chinese ancestry. This "reasonable suspicion" must be based on "specific articulable facts"—particular characteristics or circumstances which the officer can, if called upon, describe in words—such as

foreign manner of dress or grooming, apparent inability to speak English, officer's knowledge of a high concentration of aliens in the area, or a specific tip from a reliable informant.

3. *Reasonable suspicion that person is an alien illegally in the United States*—the degree of suspicion that an immigration officer must have before he may constitutionally detain, short of arrest, for further questioning, a pedestrian or a person in a factory, restaurant, or similar establishment. Where this higher degree of suspicion arises it is generally after initial questioning on the basis of suspicion of alienage alone. It may be based on such factors as the officer's knowledge of a high concentration of illegal aliens in the area or of recent illegal border crossings, a specific tip from a reliable informant, the subject's excessive nervousness or studied nonchalance upon being in the presence of or questioned by an immigration officer, or the subject's admissions.

4. *Reasonable suspicion that a vehicle contains an alien or aliens who may be in the United States illegally*—the degree of suspicion which an immigration officer or roving patrol or at temporary checkpoints must have before he may constitutionally stop a vehicle to question its occupants. This suspicion may be based on factors similar to those described in 3 above as well as on features of the vehicle such as fold-down seats, spare tire compartments where a person could be concealed, a large number of passengers, or an unusually heavy load.

5. *Probable cause*—the degree of suspicion which an officer must have that an offense within his jurisdiction has been or is being committed before he may constitutionally search a vehicle (except at the border or its functional equivalent, or incident to the arrest of an occupant of the vehicle) and before he may make an arrest. An officer has probable cause to arrest or search if he knows of evidence and circum-



stances which would warrant a person of reasonable caution in the belief that an offense has been or is being committed.

*Detention not amounting to arrest:* Temporary forcible restraint, usually for the purpose of conducting further interrogation.

*Frisk:* Pat-down of outer clothing of person suspected of being armed and dangerous, for the purpose of detecting a weapon. This is a limited form of search.

*Functional equivalent of the border:* Point marking the intersection of two or more roads extending from the border without any major intervening crossroad; or an airport in relation to a nonstop flight from abroad.

*Interrogation:* Questioning by immigration officers designed to elicit information concerning immigration status; goes beyond casual conversation.

*Immigration officer:* Any immigration inspector, immigration examiner, border patrol agent, airplane pilot, deportation officer, detention officer, detention guard, investigator, general attorney (nationality), trial attorney (immigration), general attorney (immigration), or supervisory officer of such employees.

*Miranda warning:* Warning given to an individual who is in custody and suspected or accused of crime that: (1) he has the right to remain silent; (2) anything he may say may be used against him in a subsequent proceeding; (3) he has the right to consult with a lawyer and to have the lawyer with him during interrogation; and (4) if he is indigent, a lawyer will be appointed to represent him.

*Stop and question* ("question" equals "interrogate"): Less intrusive than detention when a pedestrian is involved; requires the cooperation of the person stopped and questioned. When a vehicle is involved, it is the equivalent of detention not amounting to arrest.

#### d. *Private lands, other than dwellings*

Section 287(a)(3) of the INA grants to immigration officers access to private lands, but not dwellings,

within 25 miles from any external boundary of the United States for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States. "Patrolling the border to prevent the illegal entry of aliens into the United States" as used in that section means conducting such activities as are reasonable and necessary to prevent the illegal entry of aliens into the United States.<sup>12</sup>

Service policy, as expressed in O.I. 287.3, instructs patrol officers to inform the owner or occupant of private lands that they propose to avail themselves of their power of access to those lands. If a direct challenge is made to an officer's authority to carry out duties by a rancher, farmer or plant operator, etc., the matter should immediately be brought to the attention of the office supervisor. In most cases consent will be given in advance for extended periods; if not, and after all methods of persuasion have failed, including efforts by personal interview and the placing of the landholder on notice of the law by registered mail, officers may gain access to areas within the 25-mile area by the most expeditious means, if absolutely necessary. This is an extreme measure and is to be resorted to only on the direction of a supervisory officer after careful consideration. The fences and gates should be repaired immediately and precautions taken to avoid damage to the property. (Whether and what kind of legal action may be taken against immigration officers who thus or otherwise enter private land is discussed at VI below.)

The authority of section 287(a)(3) may be invoked to obtain entry onto land when such entry is for the purpose of patrolling the border to prevent the illegal entry of aliens. However, when properly on the land, INS officers may question persons found there regardless of whether those persons are believed to be recent illegal entrants into the United States.

Most of the decided cases in which private prop-

erty has been entered do not involve open lands at the border but rather involve investigations in buildings in urban areas, portions of which are open to the public, such as restaurants, factories, and hospitals. According to INS policy, these buildings are not encompassed by the grant of authority in section 287 (a) (3) even if they are located within 25 miles of an external boundary. Although immigration officers do not need permission to enter the public areas of these buildings, it is advisable to request permission to enter.<sup>13</sup> Moreover, consent or a search warrant is needed to search the nonpublic areas of these establishments, unless there are exceptional circumstances. See V.E.

To stop and question a person encountered in establishments such as restaurants, factories, or hospitals, or beyond 25 miles from any external boundary of the United States, regarding his right to enter or remain in the United States, an officer must have a reasonable suspicion based on specific articulable facts and rational inferences drawn from those facts that the person is an alien.<sup>14</sup> However, to detain such a person, the officer must have a reasonable suspicion that he is an alien illegally in the United States.<sup>15</sup> (See 3. below.)

## 2. *Frisk permitted? Other search?*

An officer may frisk—i.e. pat down the outer clothing of—a person he has stopped for questioning if he believes that the individual may be armed and dangerous, in order to guarantee the officer's own safety and that of others. If the officer feels something which may be a weapon, he may reach inside the person's outer clothing to remove it. A limited search of this type may be made without probable cause for arrest and without the absolute certainty that the person is armed. The officer may also search the area within the subject's reach for the same purpose. Such a search is reasonable within the terms of the Fourth Amendment.<sup>16</sup> Any weapon seized as a result of

such a limited search, and/or any other object seized which feels like a weapon but which turns out not to be one, is admissible into evidence in subsequent proceedings.<sup>17</sup> A frisk for weapons is justified if made on the basis of a tip from an informant.<sup>18</sup>

In the stop and question situation, any other search beyond a frisk for weapons which is not made at the border or its functional equivalent must be based on consent, a search warrant, or probable cause.<sup>19</sup>

## DECLARATION

STATE OF CALIFORNIA       )  
                                  ) ss.  
COUNTY OF LOS ANGELES   )

I, PHILLIP SMITH, declare and state as follows:

1. I am Assistant Director for Investigations at the Los Angeles District Office of the Immigration and Naturalization Service. I have held this position for over three years. I have been an Immigration and Naturalization Service officer for over 25 years.

2. As Assistant Director in charge of Investigations, it is my job to oversee the Area Control operations of the Los Angeles District Office. "Area Control" refers to operations which are designed to locate and apprehend aliens illegally in the United States.

3. Since 1977, Area Control operations in the Central District of California have been limited primarily to factory surveys. I am of the opinion that of the alternatives available for Area Control law enforcement, the surveys are one of the least disruptive and most effective. This is for the following reasons: In my experience, one of the main incentives for persons to enter the United States illegally is to obtain work. Focusing INS law enforcement efforts on workplaces diminishes this incentive. In addition, because the INS conducts factory surveys only at workplaces known to be employing a significant number of illegal aliens, the factory surveys provide a means of apprehending a large number of illegal aliens in one law enforcement operation using relatively few agents. Finally, because surveys take place only during daylight hours and at workplaces they offer one of the least disruptive and intrusive methods of law enforcement available.

4. Our office estimates that there are currently no less than half a million illegal aliens living in Los Angeles alone. Through use of the factory surveys, our office has been able to apprehend as many as over one hundred ille-

gal aliens a day. In 1977, over twenty thousand illegal aliens were identified and arrested in the course of factory surveys.

5. Factory surveys are conducted according to certain procedures which are by now well-established in our office. First, the INS obtains either the workplace owner's consent or a warrant to enter the workplace in question. In approximately ninety percent of the surveys conducted, the owner of the workplace has given consent to the survey in advance of the survey. Warrants accordingly, are seldom used.

6. Surveys are usually performed several days to two weeks after consent is obtained. Non-uniformed INS agents wearing casual street clothes enter the workplace and circulate among the workers. The workers remain at their stations. The officers ask workers who appear to be aliens whether they are United States citizens. If a worker indicates that he is not a United States citizen, he is asked to show the documentation that non-citizens are required to carry pursuant to Title 8, United States Code, Section 1304(e). If a worker does not have the required proof of legal residence in the United States, he is temporarily detained in a pre-determined portion of the factory for further investigation. If a worker's illegal status is confirmed and he appears likely to flee, he is arrested, taken to INS headquarters and subsequently either deported or permitted to return voluntarily to his country.

7. In the course of my experience with the factory surveys, I have become aware that there are certain industries in which the percentage of illegal alien workers is higher than in other industries. Among the industries in which the percentage of illegal aliens workers is the highest is the garment industry.

8. When the INS has in the past used warrants to obtain access to workplaces, it has not made a practice of listing the names of each and every worker inside the workplace. In fact, to do so would be impossible. The factories at which surveys are most often performed em-

ploy hundreds of people. The composition of the work force is not stable and changes constantly.

9. Perhaps most importantly, employers' records list false names for the employees and inaccurate data concerning the workers' citizenship status. Our office frequently spot checks employers' records to ascertain whether the employers are employing a large number of illegal aliens. We find in the course of these checks that the employers' records typically list many persons as possessing valid alien registration receipt cards who, in fact, do not have such documents. We also have found, in comparing the names of the people arrested with the names in an employer's records, that the names which the employees have given to their employer are often false.

10. In obtaining the consent of the owner to enter a workplace, the INS has not in the past obtained the consent of each and every worker in addition to the consent of the owner or manager. Again, in my opinion, this would be impossible. Factories at which surveys are conducted are factories which employ a substantial number of illegal aliens who have every wish to avoid being apprehended by the INS. There is virtually no chance that such a work force would unanimously consent to the entry of the INS into the workplace.

11. Our office maintains in the normal course of its activities records which show the number of workers employed at various factories where surveys have in the past been conducted. In 1977, our office conducted a survey at Mr. Pleat. Our records show that approximately 50 workers are employed at that factory.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: This 15th day of November, 1979.

/s/ Phillip Smith  
PHILLIP SMITH



## AFFIDAVIT OF PHILIP H. SMITH

I, PHILIP H. SMITH, having been duly sworn hereby depose and state that since May 26, 1976, I have been the Assistant District Director for Investigations, Immigration and Naturalization Service, 300 North Los Angeles Street, Los Angeles, California.

1. I am the prime supervisor and responsible for all investigative activities within the Los Angeles District of the United States Immigration and Naturalization Service. I have approximately 150 investigators and supervisors plus about 20 clerical employees under my supervision. I have the authority to establish policy and set guidelines with respect to investigative procedures and to also implement Immigration policies and policies established by the District Director.

2. Surveys for the purpose of detecting aliens illegally in the United States are conducted at various manufacturers and factories in the Los Angeles metropolitan area pursuant to policies established by the United States Immigration and Naturalization Service on a nation wide basis. It has been determined that due to the Immigration Service's limited manpower capabilities that surveys conducted at locations where aliens are employed would provide greater effectiveness in the detecting of those aliens who are in the United States illegally. This provides greater employment opportunities for persons having the legal right to reside in and be employed in the United States due to the apprehensions and removal of aliens illegally in the United States. On occasions more than 100 aliens who were in the United States illegally have been apprehended at different manufacturing companies in single survey operations.

3. Surveys are conducted by the Immigration Service in many different types of industries not only in the garment industry. Aliens illegally in the United States have been found in large numbers in the recreational vehicle industry, the womens' shoe industry, the womens' handbag industry, the garment industry and many other in-

dustries which depend upon large numbers of unskilled or semiskilled workers. Representatives of the Immigration Service usually contact the company after a complaint has been received that aliens who are in the United States illegally are employed by that particular company. A representative of the Immigration Service will contact the particular company to advise that such a report has been received, and the representative will then solicit cooperation from the company to permit the Immigration Service to conduct a survey at some future date. During the past two years that I have been the Assistant District Director for Investigations, more than 90 % of the companies which were contacted have consented to allow the Immigration Service to conduct a survey.

4. At present our office is conducting approximately four surveys per week. Because of work force limitations we conduct a very limited number of surveys, mostly at small establishments. When the Investigations Branch of the Immigration and Naturalization Service in Los Angeles was fully staffed 20 to 30 Immigration officers normally engaged in surveys daily. About two or three surveys were conducted daily under normal circumstances with an average of about ten surveys being conducted weekly. No more than two or three of these surveys each month were conducted under a warrant. An average of about 200 aliens illegally in the United States were apprehended daily, of those, between 100 and 150 were apprehended as the result of a survey.

5. All Immigration investigators are instructed to be courteous to the public and to all aliens with whom they deal. All investigators performing enforcement work are instructed to be courteous and to treat humanely all aliens who are taken into Immigration Service custody. In my position as the Assistant District Director for Investigations, I am supposed to be made aware of any complaints that are made regarding mistreatment of aliens or the misbehavior of any investigator under my supervision. There is no record of any complaints regarding the conduct of any Immigration officer involved in surveys con-

ducted at the Southern California Davis Pleating Company on January 4, 1977 or on September 27, 1977 or at Mr. Pleat on October 3, 1977.

6. Surveys conducted by the Los Angeles Office of the Immigration and Naturalization Service are never "raids" wherein large numbers of Immigration officers run into the factory. The surveys are usually carefully planned with the management of the company having been contacted several weeks prior to the survey. Before the limited number of officers available to conduct a survey arrive, diagrams have been prepared indicating the various accesses to the company. Officers are usually stationed at various entrances and exits in order to guarantee that individuals will not escape. Under normal circumstances about 25 percent of those officers available to conduct the survey are stationed outside of the plant. Supervisory officers or officers designated to be in charge of the survey will then enter the office in order to advise the owner or manager of the business that the Immigration Service would like to conduct the survey. In instances where a search warrant is used, the search warrant is served at that time and the management of the company is given ample opportunity to make preparation for the survey. The selected number of officers then enter the building or structure. Officers never run into a factory or building unannounced.

7. An attempt is also made to conduct the survey as quickly as possible with the least amount of disruption to the company being surveyed, and with the least amount of inconvenience to persons being questioned. The usual survey of a large company (one with several hundred employees) takes between an hour and two hours.

8. With respect to the surveys conducted at the Southern California Davis Pleating Company on January 4, 1977, and on September 27, 1977, it was impossible to conduct massive interrogations of each and every person encountered at the company due to the large numbers of persons employed and due to the limited number of officers available to perform the surveys. When surveys

were conducted at the Southern California Davis Pleating Company on January 4, 1977 and again on September 27, 1977, a number of employees concealed themselves when they learned of the presence of Immigration officers at the company. A great amount of time and a large number of officers were required to locate persons who either ran from Immigration officers or who had concealed themselves.

9. Immigration officers during the survey usually speak to virtually all persons employed by a company, to either ascertain a person's immigration status or to seek information from that person. Often conversations will be directed to employees not suspected of being aliens illegally in the United States, merely to request from those persons if they have knowledge of employees who are illegally in the United States or any persons who have concealed themselves from Immigration officers. Frequently, an Immigration officer will speak to an employee in response to a question posed by the employee. On some occasions, an Immigration officer will have no need to talk to a particular individual regarding that individual's status in the United States. An Immigration officer may not speak to a particular individual when he recognizes that particular individual as someone with whom he has previously conversed. The Immigration officer may have also overheard conversations between an individual and someone else and because of that person's accent, vocabulary and word usage conclude that he has no reason to talk to the individual even if that person is of Latin American, Oriental or any other ethnic appearance.

10. With respect to the surveys conducted at the Southern California Davis Pleating Company on January 4, 1977 and again on September 27, 1977, the Los Angeles Immigration Office had received a number of reports stating that large numbers of aliens in the United States illegally were in the employ of that company. When surveys are conducted reasonable questions as to a person's identity and nationality are asked and in the majority of cases an individual who is in the United States illegally

admits such illegal status to an Immigration officer immediately when asked. Only upon that admission, or upon probable cause, is the alien then detained. At that time a determination is made if the person would be likely to abscond before a warrant could be obtained. In instances where a person is found hiding or after attempting to flee from an Immigration officer, such person is detained for questioning based on the premise that he did attempt to hide or abscond.

11. It has been found that most persons who are questioned regarding their status in the United States under the United States Immigration Laws will quickly and readily respond although there is no compulsion that they answer any question posed by the Immigration officer. All Immigration officers are instructed not to detain any person simply because the person will not voluntarily answer questions. All Immigration officers are instructed that they may detain a person for questioning only upon reasonable suspicion that the person is an alien who may be in the United States illegally.

12. The Los Angeles Office of the Immigration Service has no ongoing investigations relating to an employee or former employee of the Southern California Davis Pleating Company named Herman DELGADO. Nor does any Immigration officer at Los Angeles have any interest in inquiring whether Mr. DELGADO is an alien or a citizen of the United States. I know of no attempt or attempts made by any Immigration officer to contact Mr. DELGADO at his place of employment or at his residence.

Subscribed And Sworn to Before me This Day of  
1978 at Los Angeles, California

PHILIP H. SMITH  
Assistant District Director,  
Immigration and Naturalization Service  
Investigations  
Los Angeles, California  
Deputy Clerk  
U.S. District Court

## DECLARATION OF PHILIP H. SMITH

I, Philip H. Smith, having been duly sworn, hereby depose and state that I am the Assistant District Director for Investigations, Immigration and Naturalization Service ("INS"), Department of Justice, Los Angeles, California.

1. I am responsible for all investigative officers within the Los Angeles District of INS. Pursuant to policies established by the Department of Justice, surveys for the purpose of apprehending aliens illegally in the United States are conducted at work places in the Los Angeles area. The Department of Justice has determined that due to the very limited work force of INS the surveys should be conducted at places for which there is information that a factory is employing large numbers of illegal aliens.

2. Our office files indicate that the factory survey conducted at Southern California Davis Pleating on January 4, 1977, resulted in 78 illegal aliens being apprehended out of a work force of approximately 300. The survey of Southern California Davis Pleating Company on September 26, 1977, resulted in 39 illegal aliens being apprehended out of a work force of approximately 200. The survey of Mr. Pleat conducted on October 7, 1977, resulted in the apprehension of 45 illegal allens out of a work force of approximately 90.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: This 17th day of January, 1980.

/s/ Philip Smith  
PHILIP SMITH

## AFFIDAVIT OF GAIL R. KEE

STATE OF CALIFORNIA            )  
   ) ss.  
 COUNTY OF LOS ANGELES        )

I, GAIL R. KEE, being duly sworn, depose and state as follows:

1) that I am, and have been since April 10, 1972, employed as a criminal investigator with the Immigration and Naturalization Service and assigned to the Los Angeles District Office;

2) that as one of my principal tasks I am assigned to inquire into complaints and information about undocumented aliens who are working in industrial operations within the Los Angeles and Orange County areas;

3) that I was assigned to inquire as to the work force at Southern California Davis Pleating Company and Mr. Pleat based upon complaints made to our office;

4) that the following description of the conduct of surveys by the Immigration and Naturalization Service is precisely the manner in which the two surveys were conducted at Southern California Davis Pleating Company;

5) that it is my experience that in excess of 90% of the owners/operators of the industries that I contact, when informed of the complaints we have received about their work force, voluntarily cooperate and agree to allow Immigration and Naturalization Service officers to survey their operation;

6) that I personally set up the survey of Mr. Pleat, which was conducted on October 3, 1977 and the management of that company voluntarily consented to the survey operation;

7) that in some cases, as was true with Southern California Davis Pleating Company, the owner/operator does not consent to a survey operation or asks that we obtain a warrant;



8) that, where management refuses to authorize Immigration and Naturalization Service Officers to conduct a survey, I therefore attempt to determine if there exists probable cause to support the issuance of a search warrant;

9) that, Immigration and Naturalization Service Officers enter factories in a deliberate and careful manner because in their unfamiliarity with the factory layout they wish to avoid injuring themselves on moving machinery; on tools and materials protruding into narrow isles, on sharp objects, which may be difficult to detect, because of the possibility of physical assault, and to avoid missing any individuals who are seeking to conceal themselves;

10) that our officers entered Southern California Davis Pleating Company walking carefully on both occasions;

11) that as officers enter factories there are often cries from inside the building of *la migra* (the immigration) and individuals are almost always observed attempting to flee or to hide from detection, I personally observed this happen at Southern California Davis Pleating Company on both occasions;

12) that during a factory survey, I attempt to talk to as many persons as possible, either to determine if they are themselves aliens or to obtain information about other persons who may be illegally in the United States or who may be attempting to conceal themselves from detection, and where potential hiding places may be located;

13) that Immigration and Naturalization Service Officers are instructed never to stop and detain persons solely because of their Latin appearance (policy Memorandum attached, see Exhibit A);

14) that officers not only speak to persons of Latin appearance but speak to persons who are Oriental, Black, or Anglo in appearance and apprehend them upon a determination that they are illegally in the United States;

15) that a survey such as the one at Southern California Davis Pleating Company where there are approximately 800 employees, the surveys take from one to one

and one-half hours so that the time available for our limited number of officers to question any one person is, in general, limited to a few questions and a few minutes in time;

16) that I did not observe any individuals being "roughed up" or "abused" at Southern California Davis Pleating Company, and, were I to observe this happening, as a senior investigator I would rebuke the officer and inform my superiors.

Sworn And Subscribed Before me This                      Day of  
June at Los Angeles, California.

/s/ Gail R. Kee  
GAIL R. KEE  
Criminal Investigator  
Immigration and Naturalization Service  
Los Angeles, California

/s/ Stith P. Tinsley  
Deputy Court Clerk  
U.S. District Court

## INTERROGATORY NO. 6:

Do you contend that during factory surveys INS agents do not question individuals regarding their citizenship unless they have a reasonable suspicion based on specific articulable facts that the person questioned is an alien?

## ANSWER TO INTERROGATORY NO. 6:

Agents often have such a suspicion before they speak to people during a factory survey but we do not contend this is invariably the case.

## DECLARATION OF WAYNE A. CORNELIUS

I, WAYNE A. CORNELIUS, declare as follows:

I am Professor of Political Science and Director of the Program in United States-Mexican Studies at the University of California, San Diego. My formal academic training is in Political Science, Political Sociology, and Latin American Area Studies (A.B., *summa cum laude*, The College of Wooster, Ohio, 1967; M.A., Ph.D., Stanford University, 1968, 1974). I have been a Research Fellow of the Harvard University Center for International Affairs (1971-1972), Professor of Political Science at the Massachusetts Institute of Technology (1971-1979), and a Fellow of the Woodrow Wilson International Center for Scholars at the Smithsonian Institution, Washington, D.C. (1979-1980).

For the past twelve years I have specialized in studies of Mexican labor migration (both rural-to-urban migration within Mexico, and migration from Mexico to the United States). I have authored, co-authored, or edited six books and more than 30 research papers, published in professional journals and anthologies, in this field of research. Since 1970 I have directed major research projects dealing with Mexican labor migration sponsored by the National Science Foundation, the National Institute of Child Health and Human Development (a division of the

National Institutes of Health), the Smithsonian Institution, the Social Science Research Council, the Ford Foundation, and the Rockefeller Foundation. My current research on Mexican immigration is being supported by the California Policy Seminar, a joint research program of the state government of California and the University of California.

I have conducted more than four years of field research among migrant workers in rural and urban Mexico, and I personally interviewed 185 Mexican immigrants (both "undocumented" workers and legally resident Mexicans) residing in ten cities of California and Illinois during 1978. My most recent field studies in Mexico (1975 and 1976) included personal interviews with 500 Mexican workers who had been employed in the United States and returned to their communities of origin in the Mexican state of Jalisco.

I have reviewed the depositions of U.S. Immigration and Naturalization Service investigators Jack O. Weaver, Carlos Tellez, Jr., John Brechtel, Richard Rice, Patrick Joseph Walters, Gilbert Clarin, and Philip Smith, filed in the case of The International Ladies Garment Workers Union, AFL-CIO, et al., Plaintiffs, vs. Joseph Sureck, et al., Defendants, in the United States District Court, Central District of California. On the basis of this review, and of my own studies of Mexican immigrants as described above, I conclude that the various standards employed by Immigration and Naturalization Service (INS) investigators in determining whom to interrogate in the course of factory "raids" in California are either erroneous, inappropriate, or excessively vague, such as to pose a genuine threat to permanent legal resident aliens and U.S. citizens (either by birth or naturalization) of Hispanic origin who may be wrongfully interrogated in the course of such raids. My general finding is that the standards cited in the aforementioned depositions could not, in my judgement, enable INS investigators to distinguish between undocumented aliens and legal immi-

grants or U.S. citizens of Hispanic origin, with any reasonable level of accuracy.

Several INS investigators testified that workers who speak Spanish or who speak with a foreign accent are more likely to be questioned than those who are overhead speaking English or whose speech is unaccented. Among the Mexican immigrants whom I interviewed during 1978 in urban areas of California and Illinois (including the Los Angeles metropolitan area and the city of Santa Ana, Orange County, California), 33 percent of those who were *legally* resident (i.e., legal permanent resident aliens or U.S. citizens) had no English competence, and an *additional* 45 percent of these "legals" spoke only a little English. These legal workers had been in the United States for an average of 7.6 years. Among the undocumented Mexican workers whom I interviewed, 43 percent spoke no English, and 50 percent spoke only a little English. Thus, no fewer than one out of every three (and as many as three out of every four) legal permanent resident aliens or naturalized citizens of Mexican origin would be placed at risk by use of foreign speech or accent as a criterion for interrogation.

The low level of English speaking competence among Mexican immigrant workers is not surprising, due to certain characteristics of their workplaces. Among the *legally resident* Mexicans interviewed in my study in California and Illinois, 59 percent worked in jobs requiring no English competence. Sixty-nine (69) percent of these "legals" were employed in workplaces where a majority of their co-workers were Mexican nationals. Many of them (43 percent) even had job supervisors who were Mexican nationals or Chicanos, who spoke to them exclusively in Spanish or in accented English. Given these circumstances, it is uncommon for a legal Mexican immigrant to develop a fluent command of English—much less, unaccented English—through their work in the United States.

Most INS investigators testified that "Latin" physical appearance (i.e., dark hair, dark eyes, dark skin, etc.)

was an important factor in determining whom to interrogate in factory raids. Even this criterion is not sufficiently precise to distinguish legally resident workers from undocumented aliens. Among the Mexicans whom I interviewed after their return to Mexico, who had worked as undocumented aliens in the United States on one or more occasions during the period 1969-1976, 18 percent had blue, gray, or green eyes, and 26 percent had light skin color. Sixteen (16) percent possessed all of the physical features normally associated with Caucasians (light eye, skin, and hair color, plus height above the average for Mexican nationals). Neither in this study nor in my more recent interviews among Mexican immigrants in California and Illinois did I find any statistically significant differences between legal immigrants (or U.S. citizens by naturalization) and undocumented migrants, in terms of skin color, eye color, hair color, height, or other physical characteristics.

Manner of dress is also, according to the depositions, relied upon by INS investigators in selecting subjects for interrogation. Some of the examples of dress allegedly "characteristic" of undocumented aliens which are cited in these depositions are simply erroneous (i.e., the vast majority of undocumented aliens working in U.S. urban areas do not dress in that fashion); others would be of little or no utility in distinguishing between undocumented aliens and U.S. citizens or legal permanent resident aliens of Hispanic origin. For example, in none of my interviews with urban-dwelling Mexican immigrants in California and Illinois did I encounter a single person—undocumented or legally resident—who was wearing Mexican sandals or *huaraches*, nor a *sombrero*. Such traditional Mexican peasant garb is worn today only by Mexicans working as agricultural laborers in the United States—never as factory workers or other urban workers. Among the urban-based Mexican immigrants, Mexican sandals or *huaraches* are worn only by a tiny minority *within their own residences*, as recreational footwear, and

never in the workplace. Nor are Mexican undocumented aliens more likely than legal immigrant workers of Mexican origin to wear "loose-fitting leisure slacks" rather than jeans or other fashionable types of trousers. This is particularly true among younger Mexican immigrants—both undocumented and legally resident—who strive to emulate U.S.-born youths in their clothing, hair styles, wrist watches, and other aspects of apparel and personal appearance.

Age itself is an unreliable distinguishing criterion. INS investigator Brechtel testified that he was much more likely to interrogate a younger worker than an older one because of his impression that older persons have been in the United States for some time and are more likely to be citizens. Among my interviewees there was a positive correlation between age and duration of residence in the United States, as well as between age and legal-immigrant status (or U.S. citizenship through naturalization). However, among working-age Mexicans (aged 17 to 65), the age difference between undocumented aliens and legally resident workers was not large: The median age among the undocumented aliens was 27.0 years; among the legal permanent resident aliens and U.S. citizens by naturalization, it was 33.5 years.

Other INS investigators cited mannerisms such as avoidance of direct eye contact and nervousness while answering questions as valid criteria for identifying suspected illegal aliens. However, these mannerisms are common to Mexicans of lower-class background generally. They are particularly common among Mexicans originating in rural areas or small towns, and those who have little formal education. Most Mexican immigrants, whether undocumented or legally resident in the U.S., still come from rural or small-town environments, and have less than a complete primary-school education, even though the proportion of urban-origin and better-educated persons among the total flow of Mexican migrants to the United States is increasing gradually over time. Many



U.S.-born persons of Mexican parentage also share these attributes. In Mexico, avoidance of direct eye contact is a traditional sign of deference to authority figures or to upper-socioeconomic-status individuals, particularly in rural areas and small towns. Nervousness in answering questions posed by strangers (particularly law-enforcement officers) is also common among Mexicans originating in such areas, and among poorly-educated Mexicans in general. Among the Mexican immigrants whom I interviewed in California and Illinois, the legally-resident workers actually tended to have *less* formal education than the undocumented workers (an average of 3.4 years of schooling among the legal immigrants, vs. 5.6 years among the undocumented). When confronted by a law enforcement officer, these immigrants, and even their better-educated undocumented counterparts, may have difficulty in oral expression and display other signs of nervousness. Poor people in Mexico have been socialized to fear law enforcement officers of all types, who are more likely to abuse people of lower-class background than those of upper-status groups (this is documented in my book, *Politics and the Migrant Poor in Mexico City*, Stanford University Press, 1975).

In sum, it is my professional judgment that there is no objective criterion typically employed by INS investigators to select subjects for interrogation in the context of factory raids (or other investigative activities in urban areas) which would enable such investigators to distinguish between illegal aliens and legally-resident workers of Hispanic origin with greater than 50 percent accuracy. Such a "successful identification" rate is not statistically different from purely random occurrence (chance), and thus the utilization of such criteria as a matter of routine INS investigatory practice is hardly defensible. So employed, these criteria subject legally resident aliens and U.S. citizens of Hispanic origin to an unacceptably high risk of discriminatory, improper interrogation.

I declare, under penalty of perjury, that the foregoing  
is true and correct.

Executed on 15 January 1980, at Washington, D.C.

/s/ Wayne A. Cornelius  
WAYNE A. CORNELIUS

## DECLARATION OF SHELDON MARAM

I, SHELDON MARAM, declare as follows:

I am an Associate Professor of History at California State University, Fullerton. I have been the director of Interdisciplinary Studies, California State University, Fullerton (1977 to 1979) and Director, Latin American Studies, California State University, Fullerton (1975 to 1977).

I received my academic training at the University of California, Los Angeles (B.A., M.A.) and at the University of California, Santa Barbara (Ph.D., 1972).

My principal doctoral fields were History of Latin America and History of the United States in the Twentieth Century. My secondary doctoral field was in sociology with emphasis on the comparative study of ethnic and immigrant groups, especially including Latin American and Eastern and Southern European immigrants.

Since 1969, I have conducted research on Latin-American labor and immigration resulting in a book, a co-authored monograph and twelve articles in professional papers. Recently, an article that I wrote, was awarded the American Historical Association/Conference on Latin American History 1977 James A. Robertson Memorial Prize for the best article to appear in the Hispanic American Historical Review.

During the past three years, my research has centered on undocumented immigration and my most significant publication in this area is the field study entitled "The Economic Impact of Undocumented Immigrants on Public Health Services in Orange County" (1978). Within the past two years, I have written four papers concerning undocumented immigrants. Those papers are: "The Economic Impact of Undocumented Immigrants," "The Labor Market Impact of Undocumented Workers: A Research Model," "Political Change and Mexican Migration," and "Undocumented Immigration and American Social Policy."

I have engaged in travel for the purposes of research in Mexico and Central America during Summer 1965, 1966, 1968, 1973 and December 1977, and Brazil, 1970-71, Summer 1975, and Columbia, Uruguay, Argentina, Summer 1975.

In the course of my travels and studies in Mexico, Central and South America, I have come into contact with persons from all social classes and from rural as well as urban areas. In the course of my work in the United States, I have become intimately acquainted with the Latino community in Southern California, including Chicanos as well as undocumented workers and including persons of all social backgrounds.

Since June, 1978, I have conducted research on the labor market impact of undocumented workers in Los Angeles County. This research includes a 67 question survey among 1,300 non-apprehended undocumented immigrants in Los Angeles, which was completed in January, 1979. It also includes a more recently completed survey of 825 Hispanic workers in the garment and restaurant industries in Los Angeles, a survey in which most of the respondents identified themselves as undocumented immigrants. This survey was conducted under contract with the State of California's Department of Industrial Relations. I have also presented testimony on undocumented immigration at the hearings of several local, state, and federal legislative committees, including the April, 1978 hearings of the U.S. House of Representatives Select Committee on Population; February, 1978 hearings of the U.S. House of Representatives, Subcommittee of the Committee on Appropriations; November, 1977 hearings of the California State Assembly Committee on Human Resources; January, 1979 hearings before the Los Angeles County Board of Supervisors; February, 1978 hearings before the Orange County Board of Supervisors. After my testimony before the Select Committee on Population and the Assembly Committee on Human Resources, I was asked by the chairs of each

of these committees to prepare an analysis of the testimony of the other witnesses. This analysis was published in the record of these hearings. At the invitation of the U.S. Select Commission on Immigration and Refugee Policy, I participated in a November, 1979 Washington D.C. research seminar on the labor market impact of undocumented immigrants.

I have reviewed the depositions of U.S. Immigration and Naturalization Service investigators Jack O. Weaver, Carlos Tellez, Jr., John Brechtel, Richard Rice, Patrick Joseph Walters, Gilbert Clarin, and Philip Smith, filed in the case of The International Ladies Garment Workers Union, AFL-CIO, et al., Plaintiffs, vs. Joseph Sureck, et al., Defendants, in the United States District Court, Central District of California. Based on my professional experience and records, it is my opinion that it is doubtful that a valid standard could be established for determining who might be suspected of being a Latin American undocumented alien, especially if it is based on physical appearance, language, and/or dress—the criteria most often mentioned by the representatives of the Immigration and Naturalization Service (INS) in their depositions. Indeed, physical appearance, language and/or dress are inadequate criteria for determining who is a Latin American in the first place.

A stereotype common in the United States of the Latin American is of the mestizo—the person of mixed European and Indian origins—whose native language is Spanish. Yet the Spanish-speaking mestizo constitutes less than half the population of Latin America. Tens of millions of Latin Americans are of African or mixed European and African origins. Millions of Latin Americans are descendants of immigrants who came to Latin America from Europe and Asia during the past 100 years. These include, among other nationalities, Italians, Spaniards, Portuguese, Poles, Germans, Eastern European

Jews, Lebanese, Syrians, Japanese and Chinese.<sup>1</sup> The 100 million Brazilians speak Portuguese and the Haitians French. Millions of Indians retain their Indian language as their primary, often only, language. Finally, it is not uncommon in Panama to find Panamians whose primary language is English and who are descendants of West Indians brought to Panama to build the Canal in the early twentieth century.<sup>2</sup>

Culturally there are great differences among Latin Americans even within a given country or region. Though it is a common view that most Latin Americans live in rural areas, the majority of the population, including the majority of the population of Mexico, live in urban areas.<sup>3</sup> In the major cities of Latin America the life-style and dress of the middle and upper classes is typically very comparable to the U.S. and Western Europe, whose styles they tend to emulate. And it is quite common to see workers in Latin America wearing clothing and having hair styles comparable to those of their counterparts in the United States. This commonality in clothing patterns should not be surprising. Latin American clothing and shoe manufacturers generally emulate

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<sup>1</sup> Sheldon L. Maram, "The Immigrant and the Brazilian Labor Movement," in Dauril Alden and Warren Dean eds., *Essays Concerning the Social History of Brazil and Portuguese India* (Gainesville: University of Florida Press, 1977); Robert Foerster, *The Italian Emigration of Our Times* (Cambridge: Harvard University Press, 1919); Jose Thiago Cintra, *La Migracion Japonesa en Brasil* (1908-1958) (Mexico: Colegio de Mexico, 1971); Teliti Suzuki, *The Japanese Immigrant in Brazil* (Tokyo: University of Tokyo Press, 1969); *Worldmark Encyclopedia of the Nations* (New York: Worldmark Press, 1976), pp. 2, 30, 40, 74, 88, 101, 110, 117, 126, 137, 151, 165, 173, 190, 205, 213, 222, 232, 300; Jacob Beller, *Jews in Latin America* (New York: Jonathan David Publishers, 1969).

<sup>2</sup> *Worldmark*, pp. 2, 30, 40, 74, 88, 101, 118, 126, 137, 151, 166, 173, 190, 205, 213, 222, 232, 300.

<sup>3</sup> *Statistical Abstract of Latin America* (Vol. 9; Los Angeles: UCLA Latin American Center Publication, 1978), p. 85.

styles and patterns current in the U.S. and Western Europe. And a significant percentage of the clothing sold in the U.S. and a major percentage of the shoes are manufactured in Latin America.<sup>4</sup>

Given the inadequacy of appearance, language, and/or dress as criteria for a Latin American, one wonders how they could be used as a reasonable standard for determining who might be suspected of being a Latin American undocumented alien. The depositions suggest variance in the criteria used by the agents of the INS. But generally the agents indicated that they look for individuals who appeared "Latin," dressed and wore their hair differently than Americans, and spoke a foreign language. Implicit in such criteria is the assumption that Latin American aliens are much less heterogeneous in characteristics than Latin American workers in general.

But even if one suspected critical judgment for a moment and accepted the criteria suggested by the INS as valid for recent arrivals, one would have to make a great leap in logic to accept that these criteria would hold true for those who have been in U.S. society for some time. Clothes, after all, do wear out. One assumes that the representatives of the INS are not suggesting that these workers send to their home countries when the clothes they brought with them are discarded.

The statements in the depositions also leave the suggestion that undocumented aliens over time do not adapt or acculturate to the society in which they are living or working. It seems that it can be reasonably argued that in the case of Mexican undocumented aliens that they are more likely to adapt or acculturate to Mexican-American culture than to Anglo-American culture. That is the impression gathered from my research, including, among other elements, interviews with individuals in direct and daily contact with the documented and undocumented Latino community. *If this impression is correct,*

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<sup>4</sup> U.S., Department of Commerce, *Highlights of U.S. Export and Import Trade*, FT 990, December, 1978 (1979).



then how could one distinguish between a Mexican undocumented alien of long term residence and a Mexican-American? One certainly could not accurately suggest that the alien would speak Spanish while the Mexican-American would not. Nor would it be correct to assume that Mexican-Americans would necessarily be more fluent in English than he/she would be in Spanish. It is not uncommon for Mexican-American children to speak Spanish before speaking English and for the adults to be more fluent in Spanish than in English.<sup>6</sup> The reasons are various and not germane to this analysis. But it is worthy of note that some of the Spanish-speaking "Mexican-Americans" are descendants of individuals who migrated to the Southwest from Mexico in the eighteenth century, a century before the area became part of the United States. Nor would clothing be an acceptable guide—for several reasons. First, from research it is my impression that the range of dress patterns of the Mexican undocumented alien tends to reflect the range of dress patterns within the Chicano community.<sup>6</sup> Second, it is quite common for Chicanos of all social classes to wear at times clothing that is considered the traditional folk dress of Mexico. This dress is worn, part because of style and part as an expression of their ties with their cultural roots, as has been done by Americans of African origins to express their ties with Africa. Indeed, the traditional folk dress clothing and footwear of Mexico has become accepted casual wear among Californians of Anglo background.

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<sup>6</sup> See, e.g., *The Invisible Minority* (Washington, D.C.: Department of Rural Education, 1976), p. 8; Paul Turner, ed., *Bilingualism in the Southwest* (Tucson: University of Arizona Press, 1973), p. 58; Henry Sloux Johnson and William Hernandez eds., *Educating the Mexican-American* (Valley Forge: Judson Press, 1970), p. 24.

<sup>6</sup> Chicano is defined for purpose of this analysis as a person of Mexican origin who is born in the United States.

Physical appearance, language, and/or dress are also inadequate criteria for determining even the Latin American undocumented alien who recently arrived in the U.S.—not only because of the reasons outlined above but also because such criteria could not distinguish between the Latin American who has recently legally migrated to the United States from the Latin Americans who recently entered this country without the permission of the U.S. government. Some of the INS representatives, however, indicated that they would begin their investigation if they suspected an individual simply of being an "alien." In addition to the criteria discussed earlier, some of the INS agents in their depositions mentioned extreme nervousness and failure to make eye contact with the INS agent as criteria for suspected alienage. Both are flawed criteria. It would not be surprising for Latin Americans and members of minority citizen community to be nervous when several law enforcement officials—in this case INS agents—enter the place they work and start questioning employees. Most Latin Americans have lived under authoritarian regimes where the police are viewed as extremely threatening, especially to members of poorer communities. And the tensions between the law enforcement community and the minority communities are quite pronounced and often depicted in the media. Moreover, I would suspect that many members of the majority community would feel uneasy, even extremely nervous, if they were working in a place being raided by the INS. Many people find even being stopped by a police officer about an alleged traffic violation an unsettling experience.

Using failure to look directly into the agent's eyes as a criteria reflects a profound ignorance of the cultural responses of individuals from traditional societies. Not looking directly at an individual who occupies a superior social position is often part of the cultural training of individuals from traditional rural backgrounds. One would have found this pattern, for example, among Italians and Greek immigrants in the U.S. during the same

time. And this pattern continued for a time for some of the immigrants and their offspring. The same is true in the Latino community, particularly among *some* members of the Chicano community whose parents migrated from rural Mexico.

In my professional opinion, physical appearance, mannerisms, dress and/or language are inadequate criteria for distinguishing between Mexicans or other Latin American immigrants and Chicanos.

The testimony of INS representatives also suggest that one criterion for suspecting a person of being an alien or an undocumented alien is if that individual appears to be of Latin American origin. Such a criterion suggests that millions of Mexican-Americans and other Latinos born in the U.S. somehow appear "foreign" in the land of their birth. This is, in part, a reflection of individuals of Latin American origins being perceived as darker skinned individuals, for such a perception has historically carried with it the implication that such individuals are foreigners or outsiders. It is worth recalling that Southern Europeans were often perceived in the U.S. in the early twentieth century as dark-skinned or swarthy complexed individuals. Yet today Americans of Italian or Greek origin, for example, are considered white.<sup>7</sup> What has changed is the dominant society.

The Latino criterion also carries the implication that undocumented aliens are largely Latin Americans. Though researchers generally *suspect* that the majority of undocumented aliens are from Latin America, all agree that we lack reliable data on the proportion of undocumented aliens from the various regions of the world or even reliable data on the total number of undocumented aliens in the U.S. The so-called estimates of the undocumented population have ranged from 4 million to 12 million, which indicates that there is a 500 per cent range of

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<sup>7</sup> See, e.g., John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (New Brunswick: Rutgers University Press, 1955), p. 66.

disagreement among the "experts."<sup>8</sup> The INS apprehension statistics certainly cannot be used reliably as an indicator of the proportion of undocumented aliens in the U.S. from various countries.<sup>9</sup> I was reminded of that during a conversation in September, 1978 with Dr. Guilhermina Jasso, then head of research for the INS and now co-research director of the U.S. Select Commission on Immigration and Refugee Policy. As Dr. Jasso indicated, the apprehension figures cannot be used as a reliable indicator of the proportion of undocumented aliens from various countries. Nor can it be used, she indicated, even as an indicator of the relative concentration of undocumented aliens in various regions of the U.S. INS apprehension figures reflect, she stated, INS apprehension practices.

To accept the present criteria as valid because it is based on the impressions of INS agents is akin to accepting the statement of the Police Commissioner of New York who in 1908 charged, based on his impressions, that half the criminals in New York City were Jews.<sup>10</sup> Or it is akin to accepting as reasonable the viewpoint of those who suspect an individual being charged with being a member of the Mafia is a Mafioso if the suspect is Italian. Such viewpoints fit the classical, definition of prejudice:

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<sup>8</sup> Kenneth Roberts, et al., "The Mexican Migration Numbers Game: An Analysis of Current Estimates of Undocumented Migration from Mexico to the United States and Suggestions for Alternative Estimates," (Austin: University of Texas, Bureau of Business Research Report, 1977); Wayne Cornelius, *Mexican Migration to the United States: Causes, Consequences, and U.S. Responses* (Cambridge: MIT, 1978), pp. 10-13.

<sup>9</sup> Roberts, *Migration Numbers Game*; Cornelius, *Undocumented Migration from Mexico*, p. 12.

<sup>10</sup> Arthur A. Goren, *New York Jews and the Quest for Community* (New York: Columbia University Press, 1970), p. 25.

"Prejudice . . . is a term applied to categorical generalizations based on inadequate data and without sufficient regard for individual differences . . ." <sup>11</sup>

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18 day of January, 1980 in the County of Orange, State of California.

/s/ Sheldon Maram  
SHELDON MARAM

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<sup>11</sup> Quoted in George Simpson, J. Milton Yinger, *Racial and Cultural Minorities* (Harper and Row: New York, 1972), p. 26.

## DECLARATION OF JOE RAZO

I, JOE RAZO, declare as follows:

1. I am employed by the State of California, Division of Labor Standards, Office of Enforcement. My position is that of Director of the Concentrated Enforcement Program, a post I have held for approximately two years.

2. Prior to my appointment to my present position, I served for 1½ years as chief consultant to the Joint Legislative Oversight Committee of the Agricultural Labor Relations Board, a joint committee of the California Legislature. Before that, I was an investigator for the Hon. Leo McCarthy with regards to labor issues.

3. Through my activities with the Division of Labor Standards and prior to that with the State Legislature, I have had the opportunity to speak with and interview literally thousands of Spanish speaking workers and their families.

4. The Concentrated Enforcement Program which I direct was authorized in January, 1978 and began operations in April, 1978. The objectives of the program are to (a) eliminate exploitation of workers in marginal industries (a marginal industry is defined as one with a history of exploitation) and (b) to eliminate unfair competition resulting from the exploitation of workers by certain employers in these industries.

5. The industries we concentrate on are those which have histories of exploiting workers through violations of State Statutes governing minimum wages, safety conditions, and other provisions of the State Labor Code. Those include, among others, the garment industry, the furniture manufacturing industry, car washes and restaurants.

6. The workers we encounter in these marginal areas have historically been Spanish speaking, that is workers of Latin origin.

7. In the Concentrated Enforcement Program, I have a staff of 61, including 32 investigators. The staff is currently all located in Los Angeles.

8. Our program involves going into the field and directly inspecting places of employment in marginal industries. We may investigate a particular location as a result of a complaint by a worker or competing employer or simply as a result of random selections.

9. When we arrive at a location, we request permission to enter, which is given in excess of 90% of the cases, and we inspect time cards, payroll records, and speak to the employer and perhaps some employees. From the records of the employer, we obtain home numbers and attempt to conduct home interviews with at least 10% of the work force of a given location. These interviews are conducted to determine if the employer is complying with the provisions of the State Labor Code.

10. Based on my experience and the experiences relayed to me by my investigators, I can state that there is no way to determine by looking at a worker in those industries if they are citizens or aliens. They are indistinguishable in dress and manner from native-born workers in the same industries. We can reasonably conclude that workers who flee when we arrive are probably undocumented, however, very few do this and most simply remain at their work stations.

11. We often learn during the course of home interviews, that workers are undocumented aliens, it often happens that we will gain the confidence of the worker and he or she will admit to us that they are undocumented. However, in the absence of such an admission, I have never been able to conclude with reasonable accuracy that any given individual, based on his or her appearance, is or is not an alien.

12. The fact that a worker speaks only Spanish is of little help in making this determination since my experience is that many workers in those industries speak Spanish regardless of their citizenship. In fact, I am



acquainted with 2nd and 3rd generation residents of this area who speak only Spanish.

I declare, under penalty of perjury, that the foregoing true and correct.

Executed on November 28, 1979, at Los Angeles, California.

/s/ Joe Razo  
JOE RAZO

## DECLARATION OF EDWARD TCHAKALIAN

I, EDWARD TCHAKALIAN, declare as follows:

1. I am employed by the State of California, Division of Labor Standards, as a Senior Deputy Labor Commissioner. I have been with the Division over seventeen years mostly in an investigative capacity.

2. My current assignment is the Concentrated Enforcement Program on which I am the Senior Deputy Commissioner. I am the head of the garment industry task force of the Concentrated Enforcement Program.

3. The Concentrated Enforcement Program was implemented in an attempt to eliminate exploitation of workers and unfair competition resulting therefrom in industries, such as the garment industry and others, which have had a history of exploitation of workers and violations of the State Labor Code.

4. My experience has been that the workers in those industries who have been the victims of exploitation are largely Hispanics.

5. The garment industry task force which I head has eight investigators and since the start of the program in April, 1978, we have visited over 1,800 garment factories and have interviewed many thousands of workers. Those interviews occur both at the workers' homes and at the factory.

6. I can state based on my experience, that there is no clear way to tell if a worker is an alien, whether documented or not, simply by observing him or her at the work place. We assume that a large number of the workers we come in contact with are undocumented aliens because of the exploitation that they suffer. We can also tell that some workers are undocumented aliens since they flee when we enter the factory. We, in fact, learn that other workers are undocumented aliens because during interviews some workers will confide in us regarding their immigration status. However, in the absence of those factors, it is not possible to reasonably

conclude from simple observation of clothing, appearance, or any other factor that any given individual is or is not an alien.

7. I have not observed in the course of my experience that workers who turn out to be undocumented aliens dress any differently or wear their hair any differently than citizens employed in the same industries. It is not possible to reasonably conclude from these types of factors that any individual is or is not an alien.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on Nov. 28, 1979, at Los Angeles, California.

/s/ Edward Tchakalian  
EDWARD TCHAKLIAN

## DECLARATION OF GEORGIA WREN

I, GEORGIA WREN, declare:

That I have been employed for twelve years at Southern California Davis Pleating Company.

I was working on the premises of the Company at the time that agents of the Immigration and Naturalization Service raided the plant on both January 4, 1977 and or about September 27, 1977.

My classification is that of a machine operator.

The first raid occurred on the morning of January 4, 1977. I was working my machine in the back of the building when I saw a few operators running from the front to the back and out the back door. Moments later, agents of the Immigration and Naturalization Service appeared all over the plant. Those agents went from operator to operator asking them if they were citizens of the United States and when an employee said no, they asked for green cards. The people who could not produce green cards were asked to go to the front of the building.

At this first raid I also heard the agents ask a number of the employees as they were proceeding down the rows of machines, what grade school they attended, what city that grade school was in, and what street the grade school was on.

The employees that were approached by the agents of the Immigration and Naturalization Service were not doing anything unusual or suspicious but were simply sitting at their work stations. They were generally of Latin extraction, however, and in fact, the great majority of the employees in our plant are Latins.

The second raid which occurred on or about September 27, 1977 took place between eight and eight thirty in the morning. I was sitting at my machine at the time when I saw the agents burst through the side door in the shipping department, walk right by one of the owners of the Company, Mr. Davis, without stopping and im-

mediately they began interrogating the employees who were working at their machines, proceeding in sequence up and down the rows.

I saw about thirty agents come in along with two or three officers of the Los Angeles Police Department.

During the first raid on January 4, 1977 I saw about fifty people who could not produce green cards being taken away. The men were handcuffed and were treated roughly, particularly, in the way in which handcuffs were put on them, by the agents of the Immigration and Naturalization Service.

During the second raid, there was also a large group of people that were taken away by agents of the Immigration and Naturalization Service.

Other than the few employees who ran to the back of the plant, as I have described above, all of the other employees were simply minding their business and were doing nothing suspicious or unusual when they were interrogated by the agents of the Immigration and Naturalization Service.

I am Chairperson of the shop, in other words I am the chief Union representative employed at Southern California Davis Pleating Company. There is a collective bargaining agreement between that Company and the International Ladies' Garment Workers Union.

As Chairperson, I know that the employees are generally frightened about future raids and they fear that no matter what they may tell agents of the Immigration and Naturalization Service, they may be taken away. They are very much opposed to the indiscriminate questioning that occurred at Southern California Davis Pleating Company in the two raids that I have described in this declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23 day of February, 1978 at Los Angeles, California.

/s/ Georgia Wren  
GEORGIA WREN

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

No. CV 78-0740-LEW (PX)  
CV 78-3246-LEW (PX)

ILGWU, etc., et al., PLAINTIFFS

vs.

JOSEPH SURECK, et al., DEFENDANTS

DEPOSITION OF HERMAN DELGADO

Taken on behalf of the defendants, at 312 North Spring Street, 11th Floor, Los Angeles, California, on Tuesday, February 20, 1979, commencing at 10:00 a.m. before Sylvia Wonderling, CSR No. 794, a Notary Public of the State of California, pursuant to Notice.

. . . . .

[5] Q What is your place of birth?

A Mayaguez, Puerto Rico.

Q Would you please spell the city?

A M-a-y-a-g-u-e-z.

Q What is your date of birth?

A October 11, 1942.

Q Mr. Delgado, are you married?

A No, I'm not.

Q When did you first enter the Continental United States?

A First in 1946 and left in 1948. Came back in 1953.

Q Have you been in the Continental United States continuously since 1953?

A Yes.

Q Where did you enter the Continental United States in 1953?

A New York City.

Q Mr. Delgado, did you have to present any documents in New York City upon your arrival there?

A No.

Q When did you move to Southern California?

A In 1966.

Q Have you been in Southern California continuously since then?

[6] A Yes.

Q What is the highest school grade that you have completed?

A The tenth grade. I got a GED in the service.

Q Pardon me?

A I got the equivalency of a high school diploma in the service.

Q The military service?

A Yes.

Q Where did you complete the tenth grade?

A In New York City.

Q When did you serve in the military?

A In—from October 1960 to October 1966.

Q What year did you complete the tenth grade?

A In 1960, quit high school.

Q Would you list the various places that you were stationed during your term in the military?

A Boot training, Great Lakes, Illinois; stationed in Key West, Florida; went to school in Maryland, yeoman school. I got transferred to Indianhead, Maryland. From there I got transferred to USS FORRESTAL, stationed in Norfolk, Virginia. Got discharged in Norfolk, Virginia.

Q The branch of military that you served in was the Navy?

A Yes.

. . . .

37 Q What have you heard your fellow employees say?

A Well, the only time I experienced where they were fearful of the immigration was when you people came in. As far as before then, no.



Q What expressions of fear did you hear from other employees?

A When you first—when they first came in there?

Q At any time. When have you heard?

A The only time I seen them being fearful is when the word immigration is brought up, when—and I still wouldn't know if they're legally or illegally, because it's not for me to ask them.

Q Well, referring to a survey that took place on January 4 of 1977, were you in the factory at Davis Pleating on that date?

A Yes, I was.

Q Do you recall a survey occurring on that date?

A Yes.

Q What time did that survey begin?

A In the morning. I don't recall the time, but it was early in the morning.

Q What was the first thing that made you [38] aware of the survey?

A I saw people running toward our department, toward the back of my department. What the hell is going on. Then I saw people with badges and people yelling immigration.

Q They were yelling?

A People with immigration.

Q Were they yelling this in Spanish?

A Yes.

Q Where were you stationed at that time when you—

A No. 1 cutting machine.

Q Where did you see this activity taking place?

A They were coming from the front.

Q From the front of the building?

A Yes.

Q So you looked up from your—

A Machine.

Q —your cutting machine?

A First thing I saw was people running, and I heard a couple of people say the immigration in Spanish. So

I started looking up toward the front. And then I seen people with badges being stationed by the doors. They wouldn't let nobody go out.

Q Where did you see people running from?

[39] A From the front of the building.

Q From the front of the building?

A Toward the back.

Q Which of the fire doors were you looking out when you saw this taking place?

A The one facing front.

Q Was that to your right?

A No, that's the one that's straight ahead of me from both sections. There's one toward that corner and on in this corner.

Q Were you standing at your cutting machine at that time?

A Yes, I was.

Q How many people did you observe running?

A I saw about 10, 20 people.

Q Were any of these people people who you knew?

A No. They were from other departments.

Q Where did they run to?

A Toward the back of the building.

Q And did they run as a group?

A No. Running, you know, trying to find a place to hide, I guess.

Q Did you see any of these persons try to go out any door?

[40] A Yes.

Q The answer is what?

A Yes.

Q What happened when these people tried to get out the door?

A Well, every door was covered.

Q How many of these people did you see try to get out a door?

A I saw five trying to get out the back emergency exit but they were stopped.

Q Is this the emergency exit that is in your department?

A Yes.

Q Were any of these employees from your department?

A No. They were from the front. I don't know. I couldn't tell you which department they were from. I don't know.

Q So these were people—

A Who were up front where they see the immigration come in. They were the first ones to see the immigration and they were the first ones to start running, I guess.

. . . .

[45] Q Were any of the five officers who you observed coming through your loading dock displaying their badges?

A Yes, they had them.

Q They had their badge hanging off of a pocket?

A Yeah.

Q All five of them?

A I couldn't say all five, but I saw the badge was sticking out.

Q How many did you see that on?

A When I first looked I saw them, they were [46] just wearing—I just noticed the suit. Then I saw the badge. I saw all of them, because all of them were displaying them, even the lady cop, I mean the lady officer.

Q Did any of them have a gun?

A I didn't see no gun. They had walkie-talkies.

Q Did they all have walkie-talkies?

A I saw some walkie-talkies. I couldn't say all had walkie-talkies. I saw some walkie-talkies.

Q What did the five officers do that appeared at your loading dock? What did they do next?

A They just got stationed by the door. Then other immigration people came asking questions. But those were just mainly stationed by the doors.

Q Well, were all five of them standing at the loading area?

A No. They came in and they stationed two at the fire exit, two at the loading dock door. The other one went to the other back door.

Q What were the employees in your department doing at that time?

A They continued working.

Q All of the employees continued working?

A (Witness nods head up and down.)

. . . .

[50] Q Did the six INS investigators who came into the Bias Department all appear at the same time?

A No, they didn't all appear at the same time. They took time to get back to my—I guess they must have been asking questions up front, but I don't know. But I know when they started coming toward my department, they started asking the workers questions. I couldn't hear what they were asking. I was too far to hear.

Q What were you doing when the first investigator came into your department?

A I was cutting.

Q You were?

A Cutting.

Q Cutting. You said about ten minutes passed from the time you first became aware of the survey until investigators first came into your department. Is that when the first one of those six investigators came in?

A Besides the other ones that were stationed at the doors?

Q That is right.

A I believe so.

Q What was the total time, would you estimate, from the time you were first aware of the survey until these officers left?

A I'd say around an hour, hour and a half. [51] I'm not sure.

Q Now, that first investigator who came in about ten minutes after the survey started, came into your department, what was he doing?

A He was showing the badge to people, and I guess he was asking them if they have papers or not.

Q Did you see him approach anyone in your department?

A Yes.

Q Who did you see him approach?

A Well, he approached—he approached Guillerama and Justa, Margo and let's see. Justa, Margo. I don't know. The people that they, you know, they got picked up, they ain't working anymore. I can't remember their names. But I know they asked mostly the Latin. That's all I have working mostly is Latins. All the Latins for the papers I guess, or whatever they were asking.

Q Well, how many employees in your department did you actually observe being approached by an immigration officer?

A They asked everybody. They asked Elvita, they asked Linda, they asked—what's her name, Anna. They asked—let me see. They asked—well, they asked Armando, but he was up front. I didn't see him.

(Conference between the witness [52] and his counsel.)

THE WITNESS: I'm trying to think who I had working at that time.

MR. GOTLEIB: Q Well, can you give us a number of how many of the employees in your department did

you see being approached and questioned by immigration officers?

A Well, they—they mostly asked everybody except—except John Majors. They didn't ask him. And they didn't ask Iga and they didn't ask me.

Q You saw someone from immigration ask questions of everyone else but the last three people?

A Yeah, John Majors, he's black. They didn't ask him. Iga is Oriental. They didn't aske her. And they didn't ask me. I don't know why. They didn't. And they didn't ask my supervisor.

Q Did you say they did question your supervisor?

A No, they didn't. All they asked of him was to open the cabinet and the back door. There's a little storage room out there. But he didn't have the key. He had to go get it from the superintendent.

Q And what was your supervisor's name?

A Danny—oh, I forgot his name. Danny—Danny—Danny—Danny—Danny Marujo, M-a-r-u-j-o.

[53] Q And is he of Latin origin?

A Latin. He looks, yeah, Latin, but they didn't ask him. Spoke too good English.

Q The five or so persons who hid in your department, did you see what happened to any of those people?

A Well, the—I find out that Trevino was hiding in the elevator, Trevino, Raoul—not Raoul—Raphael and Trevino were hiding in the elevators. They caught those. They had to get—I don't know how they did it, but they stopped the elevator in between floors and took them to get them down.

Q Did you observe this happening?

A Yes.

Q From your work station?

A Uh-huh. I stopped working then after all this commotion. I started walking around, see what the hell was going on.

Q Did you leave your department?

A Yes, I went up front.

Q So you are saying that of all the employees in your department there were only four of you who were not asked questions by the immigration service?

A Yes.

Q In other words, you saw everyone else in your department being questioned by an immigration officer?

[54] A (Witness nods head up and down.)

Q Were there any other employees in your department, other than the one black person and the one Oriental person you have named, anyone else in your department who was not of Latin background?

A No. All of them were Latin.

Q Everyone else in your department was—

A Latin.

Q —Latin? Why was it that you were not approached by an immigration officer?

A I don't know.

Q Your answer is you don't know?

A No.

Q Did you hear any conversations between any immigration officers and any employees?

A Of mine? I heard the two in the back, I heard they were asking—they—when they asked Linda, I heard them ask her what—show her papers, and she did. First he showed her the badge and identifying himself as being an agent.

Q Could you speak up?

A First he identified himself to her. He showed her the badge that he was an agent. Then he asked if she was an alien and where was she born. And then he asked her to produce her papers, and at that time she did.

[55] Q What were her answers to his questions?

A She said yes, she was a Mexican, and they asked her did she have any papers. She said yes. She showed them to him.

Q Then what happened?

A He looked at them and he kept on walking, asking other people.



Q He gave her back her papers?

A Yes.

Q And then left her?

A Yes.

Q Did you overhear any other conversations?

A No.

Q Did you see any agents from INS draw a gun on anyone?

A No.

. . . . .

[57] Q What did you observe?

A They didn't bother to hide. They were working at the station. Immigration came up to ask them for papers. They couldn't produce any, so they took them into custody.

Q What was the first thing they said to each of those people?

A I couldn't hear. I said that's when I was at my cutting machine, and that's about the joining machines, about 35 feet in that direction, so I didn't hear.

Q So you couldn't hear the conversation?

A No. I just saw them take them into custody and it shocked me. I thought they had papers. It shocked me.

Q Did they put handcuffs on any of the people in your department who were being taken away?

A Yes.

Q On each of those people you have named?

A Uh-huh. They put handcuffs on everybody that they took out of there.

Q Now, other than the two people who were in the elevator shaft, each of the other people in your department who was taken into custody stayed at their [58] machines working?

A No. They took them from the machines, put them to the side, handcuffed them and wait until they had enough group of people to load into the buses.

Q Did they take into custody, other than the people who hid in the elevator shaft, did they—

A I just said yes.

Q Did they take other people who were hiding from your department?

A Oh, yes—oh, no. They couldn't find—I don't know where he hid himself, because they couldn't find him. And they searched thoroughly. Believe me they did.

Q Well, these two employees in your department who were working at their machines before they were taken away, were they doing anything unusual?

A No.

Q Were they working at their normal pace?

A They were—they was scared. They were working, but they were scared. The whole factory was put to a stop, standing still.

Q How could you tell those two employees were scared?

A When they—by the looks on the faces. They were nervous when they were going into their bags, shaking. That's got to be scared.

[59] Q While they were working at their machines?

A No, when the immigration came up to ask them for their papers, I guess is when they started fumbling into their bags. That's the sign.

Q What were they doing just before the immigration officers came up to them?

A They were trying, I guess, just trying to avoid them, keep on, you know, trying to make believe they were still working. They were still trying to do their normal work. But they were too scared, I guess, because they got taken out of there, because they didn't have no papers.

Q Well, did you see them? Did you observe them before the immigration officers came up to them?

A No, because I was trying to look other places. But I saw them when they were apprehended. I looked up and they were being taken to the side.

Q You weren't observing them just before the immigration officers came up to them?

A No. I was looking other places, trying to see what the hell was going on, trying to see if they were asking everybody. They bypassed certain people.

Q Were you approached in any way by an immigration officer?

A No. They asked me one question, did I have [60] a key to the back door.

I said, "No, I don't have a key."

That's when I called Danny over and told him to call the super. He keeps the keys to the back door. So he called. He paged the guy to come and unlock the door. And he came and unlocked it.

But the only things he keeps back there is cleaning stuff.

Q You indicated that you left your work area after some time?

A Uh-huh.

Q How long after the survey had started did you leave your work area?

A About 20 minutes, 25 minutes later.

Q Where did you go?

A I went up front to see.

Q Where up front did you go?

A To the front of the building.

Q Did you go into the office?

A Oh, no, just went to the front to see what the hell—

Q Did you go anywhere else in the factory?

A Uh-uh. I came back to my—to my department.

Q After how long?

[61] A About ten minutes I spent.

Q Then what did you do after you came back to your work area?

A I went and started my cutting machine.

. . . . .

[67] Q You were not at your machine though?

A No. At that time I was the complete supervisor.

Q You had been promoted to supervisor then?

A Yes.

Q Did you have a desk that you were working at?

A Yes.

Q Where in the department is that desk located?

A It's sort of like in the middle of the department.

Q In the middle of the department?

A Yes.

Q Would you describe what is within 20 feet of you at that desk all the way around?

A There's a desk to my left. I would say a table, a cabinet behind me and a long table, cutting machines and all the stuff.

Q Which direction are you facing in?

A Me? I was facing toward that big fire door.

. . . . .

[70] Q Now, you have said that at the second survey you first became aware that a survey was taking place by the fact again people were fleeing?

A Uh-huh.

Q How many people did you yourself observe fleeing?

A Maybe 12 people. The first, you know, then more later.

. . . . .

[71] Q What was the very next thing you observed?

A I figured that the immigration was back again and then just continued working like I had some work orders to write up, so I just continued writing.

. . . . .

[75] Q After you observed these seven officers, what was the next thing you observed?

A Well, I went up front because I heard the police were there. I said what the hell the police got to do with this, and I went to make sure that that was correct, and it was correct. LAPD up there.

Q How did you hear that LAPD was there?

A From the people, one of my workers was coming from up front, floor help, delivering something. And he was just coming back and he said LAPD were up there.

Q You walked up to the front at that point?

A To see the police.

Q And what did you observe then?

A Police officers.

Q How many?

A In uniforms, around five.

Q What were they doing?

A They were stationed up front.

Q Where in the front?

A In the front by the loading dock.

[76] Q Then after you observed those five officers, police officers, what did you do?

A I walked around the factory and I noticed more immigration people. Some with walkie-talkies and stuff, stationing, some stationed someplace, go to a certain station, so and so.

Q Well, when you first observed that group of about a dozen people fleeing from the front to the back, did you observe any immigration officers at your loading area or at the emergency exit?

A (Witness nods head up and down.)

Q How many? The answer was yes. How many?

A I couldn't—I couldn't say. I just—they were there. I didn't count them this time. I just noticed that they were being stationed in the same place as before, so I could say the same number and I could be correct, I could be wrong. It might be more or less.

Q So you don't recall how many officers, immigration officers?

A No, I didn't bother to count the people because it was none of my business.

Q Did you turn around to look at the loading dock?

A Yes.

Q And at the emergency exit?

[77] A Yes.

MR. FENTON: The answer is yes for the record, is that correct?

THE WITNESS: Yes.

MR. FENTON: Try to say yes. It is easier for the record than a nod. Although Mr. Gotleib seems to understand and I understand, the record isn't going to look very good.

MR. GOTLEIB: Q How much time passed from the time you first saw this group of about a dozen fleeing to the time that you saw the immigration officers at the loading area in your work area?

A Three or four minutes.

Q After you had been in the front, you said you began wandering around the factory. Did you just freely walk up and down the aisles?

A (Witness nods head up and down.)

Q Would you state your answer, please?

A Yes.

Q How long did you do that?

A For about ten minutes or so.

Q Did you observe other persons fleeing or hiding?

A I saw them running, but I didn't know whether they went to hide or not.

Q Did you have any encounter with any [78] immigration officer during that ten minutes?

A No. Only when I went back to my department.

Q After that ten minutes then what was the very next thing you did?

A I went back to my department.

Q Where did you go?

A I went to my desk and started talking to my assistant supervisor.

Q What is that person's name?

A Michael Gonzales.

Q What was your conversation about?

A The immigration, you know, what they were doing.

Q Do you recall your conversation?

A Not—not in generally, no.

Q Generally what was said?

A We was just talking about—about, you know, why another raid.

Q Was that conversation in English?

A Yes.

Q When you finished your conversation, what was the next thing that happened to you?

A An immigration officer came up and asked me and my cousin where we was from.

Q And that is Mr. Gonzales?

[79] A (Witness nods head up and down.)

Q What was your answer?

A I said Puerto Rico. He asked me what city. I said Mayaguez. And he made that comment about that ship that got taken by the Vietnamese or whoever it was, the Chinese.

Q Then what happened?

A He walked away. Then I heard him say, he said, "When we come back we're going to have to check them closer. They speak too well of an English."

Q Who did he say that to?

A To his partner.

Q How far were they from you at that time?

A From here to there, six feet.

Q Did Mr. Gonzales respond to these questions also?

A Oh, yes.

Q What was he asked specifically?

A The same thing I was asked, where was he from.

Q What was his answer?

A Puerto Rico.

Q Was he asked any other questions?

A No.

Q Do you know why they just asked him that [80] one question?

A No.



Q Did he then leave after he was asked that one question?

A Yes.

Q Where did he go?

A He went toward the back to use the bathroom, I guess.

Q Can you describe the immigration officer who approached you and talked to you?

A No, I can't.

Q Can you describe the other one who—

A The other one was a Mexican, Mexican about five feet something, five feet six, five feet seven, chubby. The other one was taller.

Q The one who spoke to you was tall?

A Yes.

Q Can you describe what either of those two officers were wearing?

A One was wearing dark trousers with a wind-breaker. The other one was in a suit.

Q Which one was in a suit?

A The tall one.

Q Were they both displaying their badges to you?

[81] A - Yes.

Q Did either of them have a gun?

A I didn't see the gun.

Q Do you recall the very first thing that that immigration officer said to you?

A He identified himself as so-and-so, showed me the badge, and then asked me where I was from.

Q After that tall immigration officer walked away from you, what did you do?

A Continued work.

Q Were you sitting at your desk?

A No, I was standing.

Q You were standing when you had the conversation with the immigration officer?

A Yes.

Q You continued to stand afterwards?

A Yes.

Q Do you recall how much longer the immigration officers were at the factory?

A Well, this time it seemed like they did it quicker than the first time. I couldn't say how long, because I don't know when they came in, you know, up front. I just only stayed for a while. I saw when they came back to the back of the building. When they were up there, maybe they were up there a half hour, maybe an hour, before they got [82] permission to come into the building. I don't know.

Q Did you observe this time people from your department being taken into custody?

A From my—the second raid? Let me see. No. They all got clean. None of them were taken.

Q You didn't observe anyone from your department being taken into custody?

A No.

Q So when the immigration people left everyone who had been in your department before immigration came that morning was there?

A Yes. The ones that were hid, they couldn't find them. They didn't look in the cupboard. See, I got a trash can back there, and that was hiding them. They didn't see that. If they would have seen that, they probably would have taken them.

Q Other than the employees in your department who hid in that cubbyhole, did the remainder of the employees continue working?

A Yes.

Q Now, you have identified in your department that there were two blacks, one Oriental—

A One black—

MR. FENTON: One Oriental and two Caucasians.

MR. GOTLEIB: Q And two Anglos during the time [83] of the second survey. Were any of those four persons approached by an immigration officer?

A No, not that I noticed, no. I didn't see them approached. I don't think so.

Q You didn't have your eye on any of those four people throughout the whole survey?

A This time I didn't bother to, because I got kind of angry. I just did my scene at that time, just continued writing my work orders and—they asked as the same people before. They asked for the papers and they had them. They showed them. After they showed them the papers, they went on asking the other people.

Q Did you talk to any of those four people we have referred to?

A After?

Q After the survey?

A No, I didn't.

Q Did you see anyone from the factory being handcuffed and taken away?

A Yes.

Q Can you put a figure on about how many people you saw being taken away?

A Around 30.

Q 30 people you personally observed being taken away?

[84] A Yes.

Q Were all the employees in your department who are of Latin background asked questions by the immigration officers?

A Well, this time I didn't bother to see who they were asking questions. I wanted to avoid them. When I heard that question that they were going to check me out later, I just got angry, you know. What the hell is he talking about, check me out. So I just didn't bother paying any attention. That's when I called Mr. Jim Davis and told him the remark they made to me.

Q When did you tell Mr. Davis that?

A Right after they left.

Q Right after the immigration officers left the factory?

A Yes.

Q And after the officer who questioned you left, you indicated that you continued working. Did you do anything else until the time they left? Did you do anything else?

A Oh, I went up front to get Loren Davis, because I needed my dock key, because I had a truck to load and they were interfering with that. They had a van blocking the loading dock. So I got Mr. Davis, Davis' son, come over there and tell those people to move their van so I can [85] get my truck in there and load the dresses. That's when I saw the buses and people.

Q What did you see?

A Buses loading people.

Q How many buses?

A I saw around two buses.

Q Where were they?

A They were on 11th Street.

Q And what door were you looking through to see that?

A The loading dock door.

Q The front loading dock?

A No, the one in back, mine.

Q By your department?

A Yes.

Q After your conversation with Loren Davis, what did you do?

A I started loading the truck, giving orders to load the truck, because they moved the van and my truck came in. We started loading the truck.

Q Did you have any other contact with anyone else from the immigration service at that point?

A No.

Q Since that second survey at Davis have you had any contact with anyone from the immigration service? [86] A No. I heard a remark when I was telling the guy to move the can that they know that they didn't get all the people this time, so they're going to definitely come back.

Q Who said that?

A One of the immigration officers to another immigration officer, the ones that were stationed outside the building.

Q Did he say that in a normal conversational tone?

A Yes.

Q Was this officer either one of the two who—

A No, no, no. This is—

Q —who you earlier had contact with?

A No, this is another officer.

Q Did you say anything about this survey to any of the management at Davis?

A I mentioned it to Ramona Correa.

Q What did you say to her?

A I mentioned the fact that they—what they said, that they know that they didn't get all the people, that they were going to come back.

. . . . .

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV 78-0740-LEW (PX)  
CV 78-3246 LEW (PX)

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ILGWU, etc., et al., PLAINTIFFS

vs.

JOSEPH SURECK, et al., DEFENDANTS

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DEPOSITION OF RAMONA CORREA

Taken on behalf of defendant at 312 North Spring Street, 11th Floor, Los Angeles, California, commencing at 10:30 A.M., Wednesday, February 21, 1979, before Sylvia Wonderling, CSR 794, a Notary Public of the State of California, pursuant to notice.

\* \* \* \* \*

[5] Q Who is your employer?

A Lloyd Klein, Gene Davis.

Q Is that a firm for which you work?

A Yes, it is.

Q And what is the name of the firm?

A Southern California Davis Pleating Company.

Q What is your date of birth?

A 7-18-42.

Q And your place of birth?

A Huntington Park, Los Angeles, California.

Q How long have you been employed at Southern California Davis Pleating Company?

A 20 years.

Q What is your current position there?

A One of the managers there.

Q How many managers are there?

A I'd say there's about five, maybe six of us.

Q What position did you start at Davis as?

A As a stamper.

Q How long have you been a manager?

A For a little over a year, I'd say, about a year.

Q Do you recall the date that you were made a manager?

A No, I don't.

\* \* \* \* \*

[48] Q Where did you see that first officer? Where was the first officer?

A You could say on the side of Tenth Street.

Q Was the officer standing still?

A Yes.

Q What was he doing?

A Just standing there.

Q Where exactly in the factory was he standing?

A On the side of Tenth Street or main entrance side.

Q Was he standing by a wall?

A No. He's standing on the first row of the machines, right at the end of it.

Q Do you recall what he looked like?

A Oh, I guess he was close to six feet tall, fair, sandy-colored hair.

Q Did he have a badge?

A I remember seeing a badge, yes.

Q Where was the badge?

A In his lapel.

Q Did he have a gun?

A I didn't see one.

Q When you first saw the officer, he was just standing there?

A Uh-huh, yes.

[49] Q What was the very next thing you observed?

A I saw other officers down the rows starting to go to individuals on the shafts.



Q How many officers did you observe next?

A From what I could see where I was standing, there was three right there where I was, and I saw another three or four going through between the aisles.

Q How was each of them dressed?

A In suits.

Q Did you see a badge on each of them?

A I don't remember seeing one.

Q Do you recall whether any of them had a gun?

A I didn't see one.

Q How close were you to the nearest officer at that time?

A You're talking about feet? Maybe 15.

Q Did you overhear any conversation at that time that any of them were having?

A No.

Q At this point we are talking about approximately six officers, is that right?

A (Witness nods head up and down.)

Q Would you just describe in your own words what you saw them doing? After you saw the six or so officers, what did you see them doing next?

[50] A I saw them going row through row, asking. I don't know if they were asking them were they citizens, did they have green cards or where they were born. I didn't hear them, because they were further down. Okay. But I could see them. The ones that were coming down the sections where I was were asking them where they were born. Those I did see.

On the other side I saw them taking men away with handcuffs on. I saw two women, one of which was colored and one of which was white, that was laughing as they were taking these people away.

Q Who were those women?

A They were also Immigration officers, as far as I know. They were with the men.

Q Besides laughing, were they doing anything at the factory at that time?

A Well, they were taking people.

Q The six officers that you observed, were they walking down the aisles?

A Yes.

Q Were any of them running down the aisles?

A Not any I saw.

Q Did any of them put their hand on anyone that you observed at that time?

A Let's see. Now, you're talking about when I was looking at—when I first saw them?

[51] Q Yes.

A I don't think so.

Q What did you observe, if anything, among the employees at that time?

A What do you mean what did I?

Q Well, were any of the employees doing anything to attempt to hide from any Immigration officer?

A I didn't see any.

Q Did you see any employee leave his position, moving quickly?

A No.

Q Did you see any employee run?

A No.

Q Did you see any employees who appeared to be nervous at that time?

A Everybody was nervous once they knew the Immigration was there.

Q After you observed the six officers going through the rows, what did you next observe?

A Well, then I saw the—them taking them away to the side, the people that they apparently didn't have any proof of where they were from. I saw them take them by the arm. The girls, they'd take that way. And the men I saw them with the handcuffs. I didn't see any officer actually handcuff them. But I saw all these men with handcuffs on them. They [52] were all led to one side of the building, which at that time was pretty clear. And out the side door, which would be Eleventh Street.

Q Did you know any of the men who were being taken away?

A Did I know them what, by name?

Q Yes.

A Not really. Say first-name basis, not but the full names, no.

Q Were any of them under you, that is you being a supervisory employee?

A I don't think so. I don't remember any of them being taken. There was so much confusion, I mean afterwards, you know.

Q How many Immigration officers did you personally observe during the course of the survey?

MR. FENTON: You mean the entire survey you are talking about?

When he says survey, he is talking about what you consider raid. During that entire raid, how many officers did you see?

THE WITNESS: I don't know. There was six there. I saw four over there, plus the ones I saw could have been anywhere between 10 and 15.

MR. GOTLEIB: Q Other than the two women [53] officers you have already identified, did you see any other women officers?

A No.

Q Did you overhear any conversation between an officer and an employee?

A Just the one I interpreted from, and oh, there was a couple of others. This is the first raid we're talking about, right, or all of them combined?

Q We are talking about the very first incident that you have referred to in your declaration.

A Okay. Just the one I interpreted for.

Q And how did that come about? What were the circumstances?

A Well, when they were going from row to row, he stopped there.

Q Stopped where?

A Right at the girl, and which was on the third row, okay. I remember that, because I only go three rows. Anyway, he stopped there and he just stood there. And she called me. So I walked over to her and asked her what's wrong.

She goes, "Tell him that I have my card, okay?"

And I told her, "All right."

So I told him and then he stood there, which I don't know whether she walked over to get it, but I just [54] interpreted what she said to him and I walked away.

Q Did you observe anything else between that employee and the officer after you walked away?

A No. He was the same one that was standing there at the very beginning when I first noticed him, and I saw him go back to that station. Then he walked over to a phone, I think it was, or a walkie—I don't know what it was. He had something in his hand. And then he stood there. And then another officer came over, which they had already checked that one side. And they both walked away.

Q How far were you standing from her before you went over to see her?

A Oh, might have been about—I don't know, about 20, 25 feet.

Q After you walked away then what was the next thing you observed?

A Well, I don't know. Since I turned away, I don't know if she got up or what she did. But I know he walked away from her, so apparently she showed him proof. She's still here, so I guess he didn't take her.

Q Were there any employees of Latin ancestry who you observed not to be questioned?

A I know I wasn't the first time and I know me. I didn't look at everyone. I didn't follow them with everyone. So I don't know if they skipped. Now, I saw on some of [55] them on the other rows, I didn't see them hit everybody. Kind of did some, skipped some, did some, skipped some. So I don't know if they were.

Q Did it appear there were some persons of Latin ancestry they were skipping over?

A I couldn't tell you for sure, no. I don't know.

Q Did you observe any officer asking any questions of any black employees?

A I didn't see any.

Q Did you observe any questions being asked of any Anglo employees?

A I really don't know. I didn't see any.

Q Where were you standing at that time after you came back from—

A I went back to the same place where I was, right at the front.

Q Is that your normal work station at that time?

A Yes.

Q Did you observe any Oriental employees being questioned?

A I didn't see any.

Q Well, from that work station that you were at at that time were you able to see any employees who were [56] either blacks, Anglo or Oriental?

A I could see some, yes, from where I was, but I didn't see the officers actually go up to them. I didn't actually see him skip them either, because when you're looking like this, I can turn away and you can change places. I didn't see you when you changed places, but I could turn around and see you're in different places. So I don't know whether he skipped them or hit them. I don't know.

Q Well, at this first incident involving the Immigration Service in January of '77, were you approached by any Immigration officer?

A To ask me, no.

Q Did you have any contact at all with any Immigration officer?

A Yes, when I interpreted for the girl.

Q And apart from that contact of interpreting for that girl, did you have any other contact?

A No, not really.

Q Well, when you returned from your work station from having translated for the officer and for that girl, what did you do next?

A I just stood there and kept looking around.

Q How long did you do that for?

A Maybe five minutes.

Q And then what did you do?

[57] A I went over and started to get everybody back to work.

Q Were the Immigration officers still there at that time?

A Yes, they were.

Q And did your employees return to work at that point?

A Well, they couldn't really. I mean, they were looking around to see what was going on. They weren't really concentrating on their work, which is something that nobody did after that. But we tried to get them to work, which wasn't, you know, a hundred percent successful.

Q And how long did you do that for, try to get them to go back to work?

A Oh, I don't know. It's hard to say.

Q Can you put an estimate on the amount of time you spent doing that?

A I don't know. Maybe a half hour, 45 minutes, because it was a matter of talking to them. "Come on, relax. It's okay. They're going away. They're not here anymore. Just forget it."

So I had to calm down, because some were crying. They didn't take them. They didn't do anything but ask them questions, but they were still crying.

Q How much time passed from the time that you [58] were first aware of that first officer at the door until you were aware that the last Immigration officer had left?

A I don't know really. Could have been anywhere between an hour, hour and a half. I really don't know.

Q Did you go to several departments at this time while the Immigration officers were there to try to get the employees back to work?

A Not in January, no. I mainly stood there because—

Q Stood where?

A In multiple, in the center part of the building. That's where I mainly stood.

Q Did you go to other parts of the building while the Immigration officers were there?

A I don't think so. I don't remember.

Q Do you recall the date of the second time that INS officers came to Davis?

A The date?

Q Yes.

A No, I don't know.

Q In your declaration you referred to it as September 27th of 1977. Does that sound about right to you?

A I guess so.

Q Do you recall a second time that the Immigration officer came to Davis?

[59] A Oh, yes.

Q You were in the factory that day?

A Uh-huh.

Q What time did that take place?

A That was also in the morning.

Q Do you recall about what time?

A No.

Q What was the very first thing you recall observing?

A A lot of rumors. Actually nothing. I heard that they were there.

Q What did you hear?

A Well, I heard—somebody walked over to me. I don't remember who anymore. Came over and said the Immigration is here.

We had heard the rumor the day before and the week before. So it was nothing unusual.



I walked to the back of the building and I saw Gene and I said, "What's this, Gene, really here?"

And he said, "Take a look up in the loft."

And there was an officer up in there. I didn't see him because it was in the dark. And I turned around and I went back to the factory. And I started telling everybody, "Stay calm. They are here, and I don't want anybody running around and nobody getting up and nobody saying nothing. [60] But stay in your places."

And I called the supervisors immediately and I told them, "Keep everybody in your area as—and let them come through here quick and get them out quick, because I don't want any more like last time."

Q What group of employees?

A Johnny Carrera, Phil, Victor. I called Herman. I told them, "Keep them quiet. I don't want anybody crying, nervous or anything else."

And then I noticed the LAPD.

Q Who were Victor and Herman? What are their last names?

A Herman is Delgado. Victor is Lopez, I believe.

Q Did you tell the employees in a particular department, did you give that instruction that you just said to a group of employees in a particular department?

A No, uh-uh. It was the departments generally. Don't remember, I was on the floor. I don't want any nervousness. And I didn't want any crying or outbursts like I had the first time.

What I did, I called every supervisor that I saw within my view, and I told them to relate the message to the rest of them. I wanted everybody quiet and to get them out of here quick.

[61] Q Where were you sitting or standing at that time?

A I was toward Eleventh Street at that time, because I walked through and started telling everybody that as I came. I came from the back, where you face, I

guess, would be the corner of Tenth Street, and I came all along Tenth Street and told them.

Then I crossed over, crossing, like you would say, like what, Central, and I went down toward the Eleventh Street side.

Q After you accomplished that, did you return to one particular spot?

A No. I continued walking through the factory.

Q How long were you doing this for?

A I really don't know. I just kept on seeing that everybody stayed calm.

Q Did you observe any employees running?

A No.

Q Did you observe any employees attempting to hide?

A No.

Q Did you observe any employees leave their work station?

A No, not really, no.

Q So every employee who you observed stayed at [62] his work station?

A To my knowledge, yes.

Q Well, after you went around the floor giving this instruction, what did you do next?

A Nothing. I just waited and looked.

Q Where were you waiting?

A I was pretty much in the center of the building, I guess you could say, more towards Eleventh Street.

Q Did you have a work station there of your own that you were waiting at?

A Yeah—no. Wait a minute. Where was I? I don't even remember really. I stationed myself pretty much wherever I was, whatever the needs were for that moment for that day.

Q Well, after you came to this point near the center of the factory, what did you observe next?

A Well, I saw on the Tenth Street side the LAPD, which I couldn't understand what they were doing there. I saw Immigration officer going back and forth and

doing pretty much the same thing as before, asking questions and taking those very few people. They took some in handcuffs.

I saw on the Eleventh Street side two officers standing by the doorway, which was an emergency fire door. There was two girls working directly in front of them.

At that time the pleating department was [63] there. And I saw them going between the rows and just taking people out, which there were very few, really.

Q And how many officers of LAPD did you observe?

A I think there was five, one of which was a female and four males.

Q And how did you know they were from LAPD?

A You can't mistake those uniforms, all navy.

Q Were they all positioned in one place?

A Yes, they were.

Q Where was that?

A The ones I saw were on the Tenth Street side, which was pretty much in the center of the building, I would say.

Q Were they standing at a wall?

A No, more like at a doorway.

Q Which door was that?

A Well, let's see. You have the entrance there and a doorway where a designing room is.

Q Doorway that goes into a designing room?

A Uh-huh. That was in the process of being built right there. It was a designing room.

Q And that is where you observed the five LAPD officers?

A Like I was standing here, and they were over [64] here. You could turn and see them.

Q How many feet away were you from them?

A When I took a close look, I was pretty close, maybe 12 feet away.

Q How many Immigration officers did you observe?

A I don't remember offhand now. I don't. I don't know. Maybe five, maybe ten. I don't remember.

Q Were any of them female?

A I don't remember seeing any females this time, the second time.

Q Were they all wearing suits?

A Yes, the ones I saw were.

Q Did all the ones you saw have a badge?

A I don't remember seeing any badge. No, I don't, uh-uh.

Q Did any of them have a gun?

A I didn't see any guns.

Q Did the LAPD officers do anything besides stand at that door?

A Not that I could see, other than walking, you know, back and forth. That was about all.

Q Where did they walk to and from?

A They walked like to one side of the building. Then they'd walk back together. Then the other one would walk over that way, then come back again to the same group.

[65] Q Did they have any conversation with any of the employees?

A Not that I saw.

Q Did you stay at this center point in the factory for the remainder of the time that the Immigration officers were there?

A No, I don't think so.

Q How long were you standing at that center point?

A I really don't know. It wasn't the center point. It was to the side of Tenth Street. I don't remember.

Q Well, while you were standing at that place, did you observe, did you overhear any conversations between an Immigration officer and an employee?

A Yes, I did, yeah. I walked back to the center, and that first row was here and I was about here. And one lady was crying. And I walked up, and he barely opened his mouth and she was sobbing so hard. She just got up. So I believe he did take her.

Q Did you overhear any conversation between them?

A He asked her for her papers and he asked her in Spanish, says, "Dos papeles," and she just got up.

Q She—

A She didn't answer. She did not. She was [66] crying. They didn't say a word.

Q Did you overhear any other conversation?

A No, not that I can remember.

Q When you were standing over by that Tenth Street side did you observe any of the employees who are either black, Oriental or Anglo, being asked a question or having a conversation with an Immigration officer?

A No, not while I was standing there, I didn't.

Q Did you observe any persons of Latin ancestry, who were employees, being skipped over by an Immigration officer?

A Not that I can remember.

Q After you left that position by the Tenth Street side, where did you go?

A I went over to the other side of the factory by Eleventh Street.

Q What happened when you got over there?

A Well, I saw them taking some men out with handcuffs through the side door, which was the emergency door, where the officer was standing.

Q The Immigration officer?

A Uh-huh. He was standing by the doorway.

Q What else did you observe?

A Well, there was people walking by which were generally more people. Anyway, so it was natural to see them [67] walk by, two people working and—

Q Did you observe any employees who were black, Oriental or Anglo being skipped over by Immigration officers?

MR. FENTON: Where, what point? You have already asked that question before.

THE WITNESS: Uh-huh. I answered it.

MR. FENTON: You asked that question.

(Discussion off the record.)

THE WITNESS: I didn't notice.

MR. GOTLEIB: Q After you observed these people being taken out the emergency exit, what did you next observe?

A I looked out through the doorway.

Q Pardon me?

A I looked out the door and I saw a green—I think it was a green bus, but it was a bus though, where they told me they were putting them. I didn't see anybody going in there. There was an officer standing outside the door of the bus that I saw.

Q Did somebody tell you that they—

A Yeah, the girls that were standing there by the door said they're putting people in that bus.

Q What girls were those?

A Those two girls working by the doorway, where the two Immigration officers were standing at the doorway.

[68] Q Were they of Latin ancestry?

A Uh-huh.

Q Do you know whether they were asked any questions by Immigration officers?

A Positively, no, I don't know whether they were or not.

Q After you observed the bus out the door, what did you observe next?

A Well, I went back in. It was quieting down, which to me meant they're leaving. And I walked back into the factory and everybody started to go back to work normally, you know, quietly.

Q Where were you at that time?

A Oh, going through the factory again. I was going through the first part of it. I didn't hit the second part yet.

Q You weren't standing still in one place?

A No, I wasn't. I was just going through.

Q Were there Immigration officers still present at that time?

A I didn't see any inside; not that I saw, no.

Q Did you have any contact with any Immigration officer that day?

A Yes, I did.

Q When did that occur?

[69] A It was during the time that I was walking through the center part of the section. And he stopped me and he asked me where was I born. And I said in Huntington Park.

Q And then what happened?

A Nothing. He walked away.

Q And what did you do?

A I kept on going. I was surprised that he asked me, really.

. . . .

[75] A Well, I hope that they stop.

Q That what stops?

A The raids would stop. I mean, okay. I understand that they're illegal. I realize that. But these are working people. They're not committing a crime as far as I know, because for one, it's none of my business what they do, if it's a personal thing. They're there working. As far as I'm concerned, as long as they're not stealing from the company, they're there working, they're not causing any problems to me or to anyone else, as far as the firm is concerned, that's all I'm interested in.

Q By "they," who do you mean by "they"?

A What do you mean?

Q Your reference was that they're not criminals, that—

A As far as I'm concerned, the people that are working in that factory, I don't know them to be criminals, criminals to come and be herded out. If they came and they had them with their name, "Well, Jose Garcia committed a crime. He's a thief and he's wanted in Mexico, one Jose Garcia."



But why go in and interrupt the whole production? People are upset, not for a day but for weeks. The minute they hear Immigration, they get panicky. Immigration [76] goes by in the car. These people are legal. They don't have anything to fear. It's just the idea, I guess, they're going to come through.

Q Well, do you fear when you see an Immigration Officer?

A Not when I see him. I don't fear for me. It's what I see.

Q. What is it that you see?

A. Well, the people themselves, the fear they see. Now the people that are there apparently had some experience with Immigration. I don't know what it is. But you can see it in their faces, their reactions, their behavior, which is very upsetting for the company. It's very upsetting for the production and for me, management. And a firm like that, it's very disruptive. And you can't compete with other people that are nonunion in a union shop at the prices they are with that kind of disruption.

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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No. CV 78-0740-LEW (PX)  
CV 78-3246-LEW (PX)

ILGWU, ETC., ET AL., PLAINTIFFS

vs.

JOSEPH SURECK, ET AL., DEFENDANTS

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DEPOSITION OF MARIE MIRAMONTES

Taken on behalf of the defendant at 312 North Spring Street, Los Angeles, California, on Friday, March 23, 1979, commencing at 10:00 a.m., before Gary L. Freerksen, CSR No. 1485, a Notary Public for the State of California, pursuant to notice.

. . . . .

[7] Q What is your job at Mr. Pleat?

A Forelady or supervisor. Forelady.

Q How long have you held that position?

A Since I started with them, about 18 to 20 years.

Q What are your duties as supervisor?

A I take care of the work and I give the work to the girls. I tell them what to do and I set up machines. From mechanic and everything.

Q Do you circulate around the—

A Yes, I am on the floor most of the time.

Q Since you have been a supervisor at Mr. Pleat, have your duties remained the same?

A Yes.

Q On how many occasions have officers from the Immigration and Naturalization Service entered Mr. Pleat's factory?

A I was on vacation one time. I wasn't there. Never seen them before since that time.

Q How many times has the Immigration Service entered Mr. Pleat's factory when you were actually there?

A Just one time.

. . . .

[13] Q You were circulating?

A Uh-huh.

Q How did you first become aware that the survey began?

A This building goes—or the X side has no fire exit. We are supposed to have these two doors opened by the fire department all the time.

Q When you say "these two doors"—

A 1 and 2. 1 and 2 doors is supposed to be opened at all times. So that day it was warm, too, and we had the doors open. That is when I seen the vans coming up the driveway in front of the building marked X. All of the vans and the men got out with their walkie-talkies and stood by the door.

Q Where did the vans park?

A On the driveway of Mr. Pleat.

Q Okay. Would you draw where they were parked?

A Right here.

Q Draw it in there.

MR. FENTON: Make a box.

MS. MUNGER: Q To show us where the vans were. Okay. I see you have drawn four little [14] squares there and labeled them "vans." Are these the vans?

A Yes. They were the vans here—I don't remember how many vans they put in the driveway.

Q Do you remember that there was more than one?

A Oh, yes. They had one parked in the sidewalk of building Y.

Q Would you draw that one, too?

Was there more than one van in front of building X in the driveway?

A Yes, uh-huh.

Q Okay. After the men got out and stood by the doors, were they standing outside the doors or inside the doors?

A Outside the doors.

Q Okay. Then what happened?

A They stood there until—they stood there until I went to see—I went to the other side to the office to see what was going on and then I seen the other doors with men on it.

Q Which other doors?

A 3 and 4. I looked to the door No. 5 and there were men there, too.

Q Okay. At this time were there men standing outside the doors?

[15] A Yes, they were standing outside the doors.

Q Were all of the doors open?

A Yes, uh-huh.

Q 3, 4 and 5?

A Uh-huh.

Q After you walked into the area Y to find out what was going on what happened?

A I went to the office and the secretary was talking to one of the officers.

Q Then what happened?

A She told me it was Immigration. I told her what was happening.

Q Then what did you do?

A When I went back to X they had already come in.

Q Did you see any people coming through doors 3, 4 and 5?

A Yes, uh-huh.

Q Before you left area Y you saw Immigration officers coming through 3, 4 and 5?

A Uh-huh, yes.

Q How were they coming in?

A Walking in.

Q Did they have anything in their hands?

A Some of them had a walkie-talkie.

. . . .

[18] A No. When I saw them walking in I went to my area, which was X, then when I met one of the officers here then he stopped me and he asked me if I had my papers, that he was from Immigration.

Q Just so I am clear on what happened while you were still in area Y, you saw the people come in but you didn't see what they did; is that correct?

A No. I know they were coming, you know, to talk to them.

Q But you didn't see them?

A No, because I walked back to X.

Q You walked back to X and then that happened?

A Halfway one of the officers asked me if I had my papers, if I had—you know, if I was an American citizen. I told him no.

So he told me if I was a permanent resident or if I had a permit to work or what. I told him it was a permit to work.

Q Did he ask to see your papers?

A Yes.

Q Did you show him your papers?

A Yes. It was lucky I had them that day.

Q Do you know you are required to carry your papers at all times?

[19] A Yes, but sometimes I change purses and I forget. I leave my driver's license sometimes.

Q Have you now told me everything that the Immigration officer said to you?

A Well, he asked me that. He told me who he was and they started all coming in and checking the girls.

Q Just focusing on your conversation with the Immigration officer who spoke to you personally, I want to know everything that he said to you and I am going to—

A That's all he said. I got scared because I figured why would he ask me if I told him I was a—that I was

a resident and I had to show my papers. What if I didn't have the paper with me.

Q That's what scared you?

A It scared me because—normally you get nervous when you see everybody is scared, everybody is nervous.

Q Did you see anybody running?

A No.

Q Did the man who spoke to you before he asked you whether you were an American citizen introduce himself to you, tell you who he was?

A He told me he was from Immigration, so when I showed him the papers I saw his badge. If I hadn't, I wouldn't have shown them to him.

[20] Q You saw he had a badge?

A Yes.

Q Was it pinned on his chest or did he have it in his hand?

A I think it was pinned to his chest.

Q Okay. You say if he hadn't had the badge you wouldn't have shown him the paper?

A Uh-huh.

Q Remember to answer yes or no.

A Yes.

Q Did this man walk away as soon as you showed him the paper?

A No. He went to the other one, another lady that was next to me and asked her the same thing.

Q Did he walk away from you?

A Yes.

Q Did he touch you?

A No.

Q Did anything that he did other than ask you for your papers frighten you in any way?

A Yes. I got—I got nervous, I guess. Everybody did.

Q And you said that you got nervous because you wondered what would have happened if you hadn't had your paper?

[21] A Yes. And I was wondering—it came to my thought—my husband at one time—my husband had light

complexion like a blonde and he was in a raid one time and they skipped him, didn't ask for his papers. He stayed 20 years before he got his Immigration paper.

Q Okay. The only thing I am wondering, Mrs. Miramontes, whether the agent did anything else—I understand that asking for the papers made you nervous. I am wondering if he did anything else that made you nervous?

A No. Just—he didn't do nothing. He didn't touch me or do anything.

Q After you finished talking to the agent did you look around and see what the agent did with respect to other people?

A Well, I stayed there. I looked around and everybody was frozen in their seats, scared. Nobody ran. Everybody just stood there.

Q How many agents were in area X at that time?

A Around six or seven at least.

Q How many workers were working in area X at that time?

A There were about 40 I would say.

Q How many workers were working in area Y at that time?

[22] A Around 15 to 16.

Q Did you observe any pattern to the movement of the Immigration officers as they moved through area X; did they seem to have a pattern?

A Yes. They went just like a cloud, you know, because everybody was seated. Nobody ran, nobody did nothing. So they just went from row to row.

Q Okay. In order?

A In order, yes.

Q About how long did they speak with each person?

A Well, if they didn't have their papers they were going to put them on the side against the wall, set them up. If they had their papers or some kind of permit they waited for them to get them out of their purse.



Q What was the longest that you saw an Immigration officer speaking to any one person?

A I don't know. I don't remember what time it took them.

Q Fifteen minutes?

A No. I think it was less than that.

Q Less than ten minutes?

A Around ten, I think, the most. Some of them were fixing their papers or something.

\* \* \* \* \*

[26] Q Did you overhear any of the questions that the Immigration officers were asking to any of the people in the area?

A Yes. They asked them where they were from. They said they were from Mexico. They would tell them if they had any proof of being Mexicans. Some were from Salvador. They were from all over. They were all Latin origin.

Q Do you have a recollection that questions [27] were the same with respect to everybody they talked to, that they had a certain order of questions that they went through?

A Yes. They seemed to be the same.

Q Exactly what was that order of questions as far as you can remember?

A If they were a citizen, if they had permanent residence or they had their permit to work, where they were from, if they were citizens from Mexico or South America.

\* \* \* \* \*

[28] Q When these people answered they were American citizens, what did the Immigration officers do then?

A Nothing.

Q They just walked off?

A Uh-huh. Walked off. I am sure they weren't carrying their birth certificates with them.

Q Did you hear anybody other than the people you have just described telling the Immigration officers that they were American citizens?

A Yes. This lady Catherine, she is an American, but she is blonde, but she is an American citizen.

Q What happened to her?

A Nothing.

Q After she told them she was an American citizen—

A They believed her.

[29] Q What did they do?

A They walked away, went to the next one.

Q Anybody else that you can remember?

A No. On the lady's side that's all that happened.

Q At any time while the Immigration officers were there, did you go back to area Y to see what was going on over there?

A Yes, uh-huh.

Q How many times did you go over to area Y?

A About two or three times.

\* \* \* \* \*

[32] Q Did you look over in the direction of the doors?

A Yes.

Q In area Y?

A Yes.

Q What did you see?

A I saw somebody in the doors, people in the doors, officers.

Q When you say they were in the doors, what do you mean?

A They were standing.

Q Standing where?

A On 3, 4 and 5, especially in section Y.

Q Where were they standing?

A Right in the door, the door frame. What do you call it?

Q They were standing beside the door?

A You could see them from the inside, but they were not inside. They were outside.

Q As you looked at the door were they a little off to the side or were they—was there space in the center of the door frame?

A They wasn't in the center.

Q They were not in the center?

A No, not all of them. They were just [33] normally in the door. They were just standing outside the door off to one side; is that right?

A One side, in the center—I don't remember that, but it was normal.

Q Were these people who were standing outside the doors doing anything with their hands?

A No.

Q Their hands were just resting at their sides?

A Their sides or I don't know what they were doing, but they—you mean holding a gun or anything?

Q Yes.

A No.

Q Were they stiff or rigid, were they standing stiffly or rigidly?

A No.

Q Did they have their hands or legs spread out to block the doors?

A No.

Q What did you think they were doing out there?

A Not to let anybody go out.

Q Why did you think they were there to keep people from going out?

A That was what the raid was about, not let [34] anybody go out.

Q Did you see them stop anybody trying to leave?

A They tried to stop one guy, but he got away.

Q Would you describe that incident for us?

A One guy walked out the door and they tried to stop him and he pushed the officer to the side and he ran.

Q When you say that they tried to stop him, how did they try to stop him?

A They tried to hold him. They didn't use no gun or nothing.

Q How far away from the—which door, first of all, did that take place at?

A This one in the front.

Q Okay. Was there one officer standing outside door 5 at that time?

A Yes. It was one officer on door 5 and later another one came and held him there.

Q At the time this worker tried to leave through door 5 there was just one officer there?

A I just seen one officer.

Q Did you hear the Immigration officer say anything to this—

A Yes. He told him he couldn't get out, [35] stay inside.

Q Were those his exact words?

A "Stay inside." I think so.

Q What did the worker do?

A He pushed him and ran.

Q After being told to stay inside?

A Uh-huh. Because the officer grabbed him by the shirt and he had a piece of T-shirt.

But he got away.

Q Did you see any other people trying to leave by any other doors in area X or Y?

A No. That was the only one.

Q Other than the one incident where you heard the Immigration officer ask the man to stay inside, did any of the officers do anything else that made you think that they were there to keep people from leaving?

A No, but that's the first thing anybody thinks standing by the door. It's normal for anybody to think to keep people from leaving. Like me, I had my papers and everything and I didn't want to go outside and look around.

Q Did you try to leave at any time during that time?

A No.

Q Did you want to leave at any time?

[36] A I wanted to leave.

Q Why didn't you leave?

A Because if I leave and they think I don't have no papers and they shoot me or something. They see me leaving and they think I'm guilty.

Q With respect to the doors in area X, I think it is doors 2, 3—2 and 3—with respect to doors 1 and 2, did you also see Immigration officers standing outside doors 1 and 2?

A Yes.

Q Were they also standing in a relaxed way outside the door?

A Yes. They were leaning against a van or something.

Q Do you remember any door where there was an officer actually standing in the middle of the door frame?

A No, I don't remember.

Q How long did the survey take?

A About an hour and a half. I think when the time came for breaktime they were gone already, nobody would break.

Q At the time of the survey were you aware of the Immigration status of any of your co-workers?

A No. You mean that had papers or didn't have papers?

\* \* \* \* \*

[42] Q They didn't ask them any questions at all?

A No.

Q What about the blonde?

A She spoke to them and they spoke back in English, the Italian and the other woman, and they wasn't asked any more.

Q Is your testimony then the only people you saw the Immigration Service completely pass by without asking any questions were the colored people?

A Colored, uh-huh, and light people.

Q You did see some people who were light who they didn't ask any questions of?

A They asked them if they are American citizens, then they say yes and that was about it.

Q When I—

A There are other—the American citizens didn't have anything to show. They were American citizens. They didn't have anything when asked.

Q When I say "passed by" I mean the Immigration Service didn't ask them any questions at all, didn't ask them if they were citizens.

Now, using that definition of "passed by," [43] would you please tell me what people were passed by?

A The colored.

Q Only the coloreds?

A Yes, in building X.

Q In building Y did you have a chance to tell whether anybody was passed by?

A In building Y there was another officer that asked the clerk, who was colored, asked him.

Q But in building Y did you have a chance to see whether there were any people who were completely passed by by the INS?

A No, because that building was empty when they left. Just a couple of workers.

Q Would you answer my question? No, you did not see anybody passed by in building Y?

A No.

Q Where were you born?

A In Mexico.

Q When did you come to California?

A In 1944.

Q Did you attend school here?

A Yes, uh-huh.

Q Did you graduate from high school?

A Yes. Roosevelt.

\* \* \* \* \*

[45] Q How did you become a plaintiff in this lawsuit?

A Because the day of the raid we were left with no workers and we were—that was a union shop. We were going to call our union. We needed help. I called Gloria.

Q Gloria—

A The one that takes care of our shop.

So I told her—I told her what happened and did she have anybody to send over, that the work had to get out. She came down and we started talking. I told her it was terrible, it was awful what happened, you know, how everybody felt, whether we were legally or not legally. I guess everybody felt the same.

I told her there should be a way we should stop this.

Q Then what happened?

A So she said, "Yes, I think so." She said, "I'll try and see can the union do something."

Even coming to the factories, or if they want to get somebody they come and get somebody, but—everybody panicked and everybody gets hurt and everybody gets—even the ones that have papers.

[46] Q How did you suffer?

A We suffered because we have feelings and we get nervous. You are not sure anymore.

Q Not sure about what?

A What is going to happen when you walk on the street, if they are going to grab you or go in the factory the next day. You just see vans and the vans come in the driveway and I think maybe the Immigration again, you know.

Q Other than the conversation that you have already described to me between yourself and the Immigration officer, did you have any conversation with any other Immigration officer during the survey?

A No.

Q Did you have any other conversation with the officer that we already discussed?

A Which officer?

Q The officer that asked you the questions.

A No. Just what he asked and that's all.

. . . . .

[48] Q You were telling me things that bothered you about the factory survey. I would like you to continue



telling me what it is that you think is bad about the factory survey.

A Well, if I would have been a Korean or from Canada I am sure they wouldn't have asked me anything, or from Thailand.

Q Why did that make you feel bad?

A Because they are not fair to everybody. Why don't they ask everybody or why don't they just stop asking and go for the ones they want.

Q Is there anything else about the factory survey procedure that bothers you?

A The whole thing bothers me. It bothers me, makes me feel bad. We stay there—people that have papers and everything were nervous and were upset for a couple of days after that, not only me.

Q Were you nervous and upset for a couple of days after that?

A Yes.

Q Why were you nervous and upset?

A I guess it's normal for every human being to feel like that.

Q Why?

A To see a lot of the people working and [49] they take them away, some were crying, some are—it just makes you feel bad. It is very sad to have to see it and if you are one of them, you know—me, I am one of them. If you are Latin or—if you went to Mexico and they did that to a bunch of white people like you, you would feel bad for them, too.

Q Okay. So you feel bad for the ones they took away?

A Bad for the ones that they didn't take because they were bothered.

Q Why were they bothered, why were the ones not taken bothered?

A Because the ones that had the papers you still have the papers and they still were bothered, they

couldn't believe they had their papers when they told them.

Q Well—

A Like I seen that lady like I told you, she told them she was an American citizen and they didn't bother her, but the other ones, dark or a little lighter than me or a little darker than me, and they had their papers and they were asked to show them.

Q Do you know that there is a statute that requires people who are not citizens to carry their papers at all times?

A Yes, uh-huh.

[50] Q Do you also know there is not a statute that requires an American citizen to have proof of American citizenship all of the time?

A That is what I mean, what are they going to prove?

Q Do you know that there is a difference in the law?

A Yes.

Q Do you oppose that difference in the law because that is unfair?

MR. FENTON: Objection. This is a very interesting topical conversation, but it is irrelevant and I instruct her not to answer.

MS. MUNGER: I think the answer is already on the record.

Q Have you told me everything about the factory survey procedure that bothered you?

A Well, I would like to help and stop these raids on the factories and on the street. I feel if they break the law they go pick them up. If he hasn't broken any other law, like just Immigration law, I don't see why they go to the places or the streets and pick them up if they are not breaking the law, but that always has been here.

Q Do you think that the Immigration Service should enforce Immigration laws?

[51] A They sould enforce it at the border.

Q Only at the border?

A Someplace, but not to bother people with papers and not papers mixed together, bother them.

Q Is there anything else about the factory survey that bothered you?

A No.

Q Have you told me everything about the factory survey that bothers you?

MR. FENTON: That has been asked and answered.

THE WITNESS: Yes.

MS. MUNGER: Q Have you had conversations with other persons of Latin ancestry about the factory survey?

A You mean have I talked about the raid?

Q The survey, have you spoken to other Latin people?

A Oh, yes. We always talk about it. We see it on television. They have a raid here, a raid over there, and what they did over here. We always hear on the news.

Q Have you every spoken to any Latin person who has told you that he shares your view about the factory survey?

A Yes. A lot of people share my views.

. . . . .

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV 78-0740-LEW (PX)  
CV 78-3246-LEW (PX)

VOLUME I

ILGWU, ETC., ET AL., PLAINTIFFS

*vs.*

JOSEPH SURECK, ET AL., DEFENDANTS

DEPOSITION OF FRANCISCA LABONTE

Taken on behalf of defendant at 312 North Spring Street, 11th Floor, Los Angeles, California, commencing at 11:10 A.M., Thursday, February 22, 1979, before Sylvia Wonderling, CSR 794, a Notary Public of the State of California, pursuant to Notice.

\* \* \* \* \*

[17] Q Was the first time that they came into the factory in 1967?

A I don't remember the dates.

Q At the time of the first incident was the company located in its present address?

A Yes.

Q Do you remember when in 1977 the second incident occurred?

A September to October, something like that.

Q What time of day?

A It was in the morning.

Q Would you please described what happened on that occasion?

A Yes. I was working when I heard a lot of movement and many men came in and they got—put themselves into all the doors. And then they came, went around to—dispersed themselves, asked a lot of people,

all the people. And they come up against me. I am surprised because I was working. And I don't like it that they should talk to me, because I can cut myself with my scissors. I can grab my hands with a needle from the machine. And that's why all the people moved.

. . . . .

[25] MS. MUNGER: Q How many officers came into the bias department?

A Ten.

Q Were they running or walking?

A Walking.

Q What did they have on? What clothes did they have on?

A Beige pants and a shirt, beige, something like that.

Q Were they all dressed alike?

A No.

Q They were not wearing a uniform, were they?

A I don't remember.

Q Did you see any guns?

A No.

Q Did you see any weapons of any kind?

A Well, no.

Q Did the men have anything in their hands?

A I don't remember.

Q Did you see any women with them when they were—

A No.

Q Did you see any handcuffs?

A Yes.

Q Where did you see those?

[26] A In the fellows that they put them on here.

Q Before they put them on anybody, did you see them?

A Yes.

Q Where were they?

A Right on the bags—the pocket of the pants.

Q Were they inside the pocket?

A Yes, you could see it on the outside.

Q How could you see them if they were in the pocket?

A One of the outside—some were on the outside, one on the outside.

Q Did the ten men that came into the bias department come in all at one time?

A I—I don't know. I—yes, I saw them like all of them like that.

Q Which way were you facing when they came in?

A I don't understand.

Q Were you facing this way or this way?

A On all sides.

Q Do you sit at a chair at your machine?

A Yes.

Q And is the machine in front of you?

A Yes.

. . . . .

[30] Q When you first looked up from your machine, was the door open?

A Yes.

Q Was it being held open by somebody?

A The immigrants.

Q Three Immigration officers were holding the door open?

A About four or five.

Q And were other Immigration officers inside the room when you first looked up?

A Yes.

Q And when you first looked up you also noticed the truck was outside?

THE INTERPRETER: When you first looked up what?

MS. MUNGER: Q When you first looked up you first noticed the truck was outside, is that right?

A I don't understand.

Q Mrs. Labonte, when you first looked up you saw four men holding this door open, is that right?

A Yes.

Q When you first looked up you also saw Immigration officers in the bias department, is that right?

[31] A Yes.

Q And you also saw that there was a truck parked outside when you first looked up?

A Yes.

Q Did you see anything else?

A The fellows that they pulled out of here forced.

Q Would you describe where that was? Where did you see that?

A Yes. They were pulling them out over here toward the outside to put them in the truck. I went out to the outside to speak with the immigrants. Why were they taking out the fellows tied up, because they were working. They weren't any criminals.

. . . . .

[34] Q You said you went out to talk to the Immigration officers, to ask them why they were taking these people away. Where were the officers when you asked them that question?

A Somewhere here outside.

Q Outside door F?

A Yes.

Q By the truck?

A Yes.

[35] Q Would you draw the truck?

A Uh-huh.

Q And would you mark the truck T?

A (The witness complied.)

MS. MUNGER: Q Now, when you went out the door to talk to the men, was the door still being held open?

A Yes.

Q Did anybody tell you you couldn't go through the door?

A No.

Q Did anybody try to stop you?

A No.



Q Did anybody ask you anything when you went through the door?

A No.

Q Did you just get up from your machine and walk out the door?

A Yes.

Q What did the Immigration officers say to you when you asked them why they were doing what they were doing?

A The immigrant answered to me, "Well, that doesn't hurt them."

Q Did he say anything else?

A No.

Q Did he ask you any questions?

[36] A No.

Q Did you speak to him in English or in Spanish?

A In Spanish.

Q Did you say anything else to him?

A Whatever I said.

Q What did you say to him outside?

A That why were they tying the boys up over here, that they were no criminals.

Q Is that the only thing you said?

A Yes.

Q Have you told me everything that they said to you?

A Yes.

Q After you finished this conversation, did you go back inside the factory?

A Yes.

Q Did you sit down at your machine again?

A You can sometimes sit up, sometimes down, because, you see, I sick, I sick, and no got the time. I didn't get any time to work because I was nervous.

Q Why were you nervous?

A Because I saw the immigrants pushing the people and asking questions and talking.

Q Did any Immigration officer push you?

A No.

[37] Q Did any Immigration officer touch you in any way?

A Yes.

Q And how did that happen?

A He said, "Where are your papers?"

MR. FENTON: Indicating for the record a tap on the left shoulder.

MS. MUNGER: Q Was that after you had finished your conversation with the Immigration officer outside?

A No, before.

Q And what did you say to him?

A I turned, and at the same time I didn't wish to identify myself. When I saw them, I said, "Yes, yes, I have my papers."

Q Then what happened?

A I took them out to show to them.

Q Did he say anything else to you?

A No, because they were looking from here to there and from there to here.

(Conference between the witness and her counsel.)

(Recess.)

MS. MUNGER: Q How long after you first looked up from your machine was it before you felt the tap on your shoulder?

[38] A I didn't understand.

Q You testified that you first looked up from your machine when you became aware of movement in the factory.

A Yes.

Q How long after that was it before you felt somebody tap on your shoulder?

A At the moment, at the moment when they started all in the factory.

Q As far as you are concerned, it happened pretty much all at the same time?

A When, yes, because there were quite a few.

Q When you felt the tap on your shoulder, did you get up from your chair?

A No.

Q Did you remain seated at your machine?

A Yes.

Q Did the Immigration officer stand in such a way that you could see him, sitting in your chair?

A Yes, because he was right here.

Q He was standing right beside your chair?

A Yes.

Q And exactly what did he say to you?

A "Where are your papers?"

Q Did he say that in Spanish?

A Yes.

[39] Q Did he say anything else?

A No.

Q And you showed him your papers?

A Yes.

Q Did you say anything to him?

A No.

Q And then did he walk away?

A They were all over asking others.

Q Mrs. Labonte, again after you showed him your papers, did he walk away from you?

MR. FENTON: She answered that question.

MS. MUNGER: She didn't answer it. This is the problem.

MR. FENTON: Well, okay.

MS. MUNGER: Q Yes or no?

MR. FENTON: Walk away from her immediate area is what you are talking about, because—

A The immigrant?

MS. MUNGER: Q Yes.

A Yes, he walked like this.

Q Have you now told me everything that you said to that Immigration officer and everything that he said to you?

A I don't understand.

Q Have you now told me everything that the Immigration officer said to you?

[40] A Yes.

Q And have you now told me everything you said to that Immigration officer?

A Yes.

Q You have now told me about two conversations that you have had with Immigration officers, one at the truck and one by your seat. Did you have any other—

A No.

Q Did you say anything at all to any other Immigration officers that day?

A No.

Q Did any other Immigration officers say anything else to you that day?

A No.

Q Other than the tap on your shoulder, did any Immigration officer ever touch you?

A No, I wouldn't permit it.

Q Did somebody try to touch you?

A No.

Q When you saw the fellows being taken out the door, would you describe how they were being taken outside?

A Yes.

Q What I am asking you to do is to describe to me the manner in which the officers were taking the men out the door.

[41] A They were taking them, two tied up like this, towards the outside.

Q Were two men handcuffed together?

A Yes.

Q And the two men that were handcuffed together that you saw were both workers in the pleating department?

A Yes.

Q Other than the two men that are tied together, did you see the Immigration officers taking anyone else outside?

A Yes, more fellows.

Q The more fellows that you saw, were they also tied together in pairs?

A Yes.

Q When you say they were tied together, do you mean they were hooked together with handcuffs?

A Yes.

Q Rope was not used?

A No.

Q How many pairs of workers did you see being taken out?

A Oh, I don't know the amount.

Q How many workers are there in the pleating department?

A About 500.

\* \* \* \* \*

[43] Q They were all walking?

A Yes.

Q They were not dragged outside?

A Well, they were taking them—no, they were taking them, pulling them. They didn't say, "Well, go on over to the car."

Q The Immigration officers were holding on to one of the workers in the pair, is that right? Okay. Was each pair of workers accompanied by an Immigration officer?

A Yes.

Q Was each pair of workers accompanied by only one officer?

A They were all together there, pulling them out and pulling them out.

Q Okay.

A Taking them out.

Q Did you see anybody fall down?

A No, I didn't see, but yes, yes, they talked about it later.

Q But you didn't see anybody fall down, is that right?

A No, no.

Q Did you see the Immigration officers hit anybody?

[44] A Not exactly hitting anybody, no.

Q Did it seem to you that the Immigration officers were handling the people roughly?

A They weren't very loving, after all.

Q They weren't very loving, but would you say they were being treated very roughly?

A Yes.

Q Now, focusing on that impression that you had, what exactly about what they did gave you that impression?

A I became very angry that they should treat like that Latin people, because if they are working to support themselves, they're good people, I think. They're working.

Q Have you told me everything that you saw that day that gave you the impression that the people were being treated roughly?

THE INTERPRETER: Well, I am using the word "badly treated," because that is the closest interpretation I can get to roughly.

MS. MUNGER: And her answer to that was?

THE INTERPRETER: Badly treated.

. . . . .

[49] Q Did you stay in area 1 and 2?

A Yes.

Q The whole time the officers were there?

A Yes.

Q Did you want to go over to area 3 and find out what was going on?

MR. FENTON: I object to that as entirely immaterial.

You can answer the question.

MS. MUNGER: Q Answer the question.

A I didn't go over there because I was over here, and I was close to the door where they were putting them in the truck. I had no reason to go over here to see what was going on if everything was happening over here.

Q So you didn't want to go over to area 3?

A For what?

Q Is the answer no?

[50] A No.

Q Was there an INS officer standing in this doorway?

MR. FENTON: Indicating K.

MS. MUNGER: Q Indicating K, doorway K.

A He was standing—standing, no, but they were all walking, walking, walking, walking all over the place.

Q There was no INS officer blocking doorway K, is that right?

A From the inside, I don't think.

Q Did you think that if you wanted to go outside you could go outside?

A Yes, yes.

Q And you did in fact go outside?

A Yes.

Q Did you understand that the other workers in the factory could also go outside?

MR. FENTON: Wait a second. I object to that on the basis it is ambiguous as to time in terms of the raid.

MS. MUNGER: Q During the raid—pardon me, the survey?

A I didn't understand.

Q During the time that Immigration officers who were at Southern California Davis Pleating, did you understand that the other workers could also go outside?

A Well, of couse they could go outside, but [51] how if everybody was in the doors? Immigration was in all the doors. How could they go out? I went out because it didn't matter to me, because as I said, I got very angry that they should treat the people in that manner.



Q They were taking people through the door, is that right?

A Yes.

Q When you say that it would have been hard for people to leave, is that because there were so many people being taken through the door?

A I don't understand.

Q You said that the Immigration officers were in the doors.

A Yes.

Q They were in the doors taking people outside?

A Yes.

Q Is that not right?

A Yes.

Q And is that why it would have been difficult to go outside?

A Of course, because the Immigration officers were standing there.

Q They were standing there taking people outside, weren't they?

A Yes.

[52] Q Were there any Immigration officers standing in the doors who were neither holding the door open nor taking workers outside?

A I don't know.

Q Were you aware of any INS officers who were standing at any door for the sole purpose to keep workers from leaving?

A Yes.

Q Where was that?

A In the factory.

Q Which door?

A I'm talking all of them, in all of them. They were in all of them.

Q How do you know that?

A Because they were there.

Q You didn't see them, did you, Mrs. Labonte?

MR. FENTON: Wait, wait. You didn't say did you.

THE INTERPRETER: No, that is a way, a form of asking the question, Counsel. I am not going to teach you Spanish, and believe me, I am very familiar with the language.

MR. FENTON: Okay. Sorry.

A (Through the interpreter) Yes, because in this door standing over here, I could also see over here.

MS. MUNGER: Q Which door could you also see?

A E.

[53] Q Door E. How could you see that?

A Because I've got my eyes and I was standing right over here and I could see all the way over here.

Q Is there a wall here?

A No.

Q You have drawn a line here, line J.

A There is no wall here.

Q You are now erasing part of line J. Finish erasing it so that it shows accurately.

A (The witness complied.)

Q Now, what did you see at door E?

A Immigrants stopped right over here.

Q How many?

A I don't remember.

Q More than one?

A Oh, yes.

Q More than four?

A Could have been four.

Q Could it have been ten?

A No.

Q Could it have been six?

A No. They were all spilled all over. They weren't going to be in just one door.

Q But there were some officers who were standing at door E, is that right?

[54] A Yes.

Q What were they doing there?

A They were guarding so that nobody would go outside.

Q How do you know that?

A Well, why would they go if not to keep all the people on the inside so that they wouldn't go to the outside? They were blocking everybody inside.

Q You have two doors here, door E and door D?

A Yes.

Q Did you walk over here so you could see it?

A No, no, no.

Q You walked over here so you could see?

A Right here.

Q So you were close to door F, looking over at doors E and D?

A Yes.

Q Did you ever walk into the pleating department, into area 2?

A No.

Q But you did walk over to door F?

A Oh, yes.

Q And you saw some Immigration officers?

A Yes.

\* \* \* \* \*

[58] Q Did you see the Immigration officers questioning people in the pleating department?

A I saw that they were moving around and talking, but I didn't get to listen.

Q So you don't know what they said to anybody in the pleating department?

A No.

Q Did you get to hear what they said to anybody in the bias department?

A Yes.

Q Who did you hear them talking to in the bias department?

A To my co-workers.

Q Did they talk to all of your co-workers?

A Not with all of them, all of them, because there are Latins and there are blacks and there are some whites.

Q Did they speak to all the Latinos?

A Yes.

Q And how do you know that?

A Because I saw them, all the Latins, all the Latins that they were moving.

[59] MS. MUNGER: May I hear the answer again? Would you read back that answer?

(The reporter read the record.)

MS. MUNGER: Q Is there any other way you have of knowing that they spoke to all the Latins?

A Well, what were they directing themselves to?

Q Mrs. Labonte, I have to ask you to answer the question yes or no.

MR. FENTON: I don't understand the question.

MS. MUNGER: Q Other than seeing that the Latin people were moving around, do you have any way of knowing whether the Immigration officers talked to all of the Latins in the bias department?

A I didn't see that they talked to all of them, but one supposes if they were all walking inside—

Q Did you see them talking to any of the blacks or whites?

A No.

Q In the pleating department did you see with your eyes who they were talking to in the pleating department?

A With the fellows there, the workers.

Q Were they talking to absolutely everybody in the pleating department?

A Some here, some there, some there, some there.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

---

No. 78-0740 LEW

THE INTERNATIONAL LADIES GARMENT WORKERS UNION,  
AFL-CIO, HERMAN DELGADO, RAMONA CORREA, PLAINTIFFS

vs.

JOSEPH SURECK, GIL CLARIN, JAMES ROBINSON, FORTY  
UNNAMED AGENTS OF THE IMMIGRATION AND NATU-  
RALIZATION SERVICE, DEFENDANTS

---

DEPOSITION OF RICHARD RICE

Los Angeles, California

January 26, 1979

[4] RICHARD RICE

having been first duly sworn, was examined and testified  
as follows:

EXAMINATION

BY MR. FENTON:

Q Mr. Rice, you have just been sworn in, and you do  
understand that you have the same obligation to tell the  
truth here as though you were testifying in the United  
States District Court? Do you understand that?

A I do.

Q Now, you are employed at the Immigration and  
Naturalization Service; is that correct?

A That is correct.

Q Are you employed in the Investigations Branch in the Los Angeles District Office currently?

A No, I am not.

Q Where are you employed?

A I'm in the Detention Section.

Q What branch is that in? Is it a separate branch altogether?

A Yes, it is.

Q Were you formerly assigned to the Investigations Branch?

A Yes, I was.

Q When were you assigned there?

A September of 1976 to September of 1977.

\* \* \* \* \*

[7] Q Now, did you go on surveys every day pretty much during that year?

A Almost every day.

Q How many surveys a day would you complete on the average, if you recall?

A That's hard to say. Probably three, maybe four.

Q How many other investigators would go with you on these surveys on the average?

A That would alternate. Probably, on the average, 20, 25.

Q Would Mr. Englert and Mr. Dodds go on these surveys on the same day, generally?

A No, I don't think so.

Q Did you have any regular assignment in terms of these surveys? Did you always do the same things?

A No, sir, it wasn't any regular assignment.

Q And you'd get assignments from day to day?

A Yes, sir.

Q Were these surveys planned in advance, do you recall?

A Yes, sir, they are.

Q What equipment were you issued in connection with these surveys? What did you take with you, if you [8] recall?

A Equipment? I would say flashlight, and of course the van or vehicle.

Q How big are these flashlights, that you are issued?

A Eight inches, ten inches.

Q Do you carry them on your person when you go on these surveys?

A Yes.

Q Are you trained to use them as a baton if it's necessary to do so?

A If it's necessary to do so, I guess.

Q I'm asking you in terms of training. Are these supposed to be used in that way?

A No.

Q Are you issued a baton or a nightstick or anything of that sort?

A No, I was not.

Q I'm talking about you. Were you issued a gun?

A Yes.

Q Did you carry a gun on your belt?

A On my belt, yes.

Q What kind of clothing did you wear when you went on surveys, do you recall?

A It depended. Sometimes I wore a suit, sports jacket, and sometimes dressed as I am now.

Q You mean with a sports shirt.

[9] A With a jacket.

Q When you went on these surveys, did you wear a badge?

A When we went into a facility, yes.

Q Did you carry handcuffs?

A Yes.

Q How many pairs did you carry, do you recall?

A I carried one.

Q Now, at the beginning of the day's surveys, did you have a meeting?

A Yes.

Q Would Mr. Smith generally be in attendance in those meetings?

A No.

Q Would either Mr. Englert or Mr. Dodds be in charge of the meetings?

A Yes.

Q At that time, they would make the assignments for the day's surveys?

A Yes.

Q Now, did they carry any sort of notebook or anything like that in which they wrote the day's plans, do you recall?

A I really don't recall.

. . . . .

[11] Q What did they tell you you were supposed to do when you were stationed outside the exits, entrances, and windows?

A In the event somebody was trying to flee the building, we would question them and ascertain whether or not they were in fact an illegal alien.

Q What if they attempted to flee? What were you supposed to do?

A Stop them and ask them.

Q Now, what instructions did they give you in terms of what you were supposed to do when you go through the factory? What were you supposed to do? What were your instructions?

A You were to question the people within the factory to ascertain whether or not they were in fact citizens or noncitizens or what their status was.

Q How were you supposed to do that?

A As we were walking through, is that what you are talking about?



Q Yes.

A You would talk to the people and ask them questions.

Q So you would walk down the rows of people, if there were rows?

A As you came to them, yes.

[12] Q Then you'd ask each person various questions?

A Yes.

Q What questions were you supposed to ask them?

A Well, first of all, you identified yourself as an Immigration Officer, what your purpose was for being there, and asked them whether or not they were a citizen of the United States.

Q All right. Is this what you would ask every person when you went on survey?

A I would, yes.

Q To your knowledge, did the other agents who were working beside you, did they do that too from what you were able to observe?

A As far as I know, yes.

Q Talking about you personally, what if a person indicated that he or she wasn't a citizen? Then what were you instructed to do, do you recall?

A Well, if they were not a citizen and they had advised us of the fact that they were not a citizen, we would ascertain what their status was in the United States.

Q What if they told you they were a citizen? Then what were you instructed to say?

A If they told us they were a citizen and we had no reason to question that fact, that terminated the interview.

. . . . .

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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No. CV 78-0740 LEW (PX)  
CV 78-3246 LEW (PX)

ILGWU, ET AL., PLAINTIFFS

vs.

JOSEPH SURECK, ET AL., DEFENDANTS

---

DEPOSITION OF CARLOS TELLEZ, JR.

Los Angeles, California

April 20, 1979

[4] CARLOS TELLEZ, JR.,

having first been duly sworn, was examined and testified  
as follows:

EXAMINATION

BY MR. FENTON:

Q Would you state your full name for the record,  
please.

A Carlos Tellez, T-e-l-l-e-z.

Q Mr. Tellez, have you ever had your deposition  
taken before?

A Have I ever had a deposition taken before?

Q Right.

A Some time ago.

Q You understand, then, that you are testifying under  
penalty of perjury as though you were testifying on a  
witness stand in a court of law.

You understand that?

A Yes, I do.

Q You understand that you have the same obligation to tell the truth here today as though you were testifying in court?

A Yes, I do. I understand.

Q How long have you worked for the Immigration and Naturalization Service?

A Going on 11 years.

\* \* \* \* \*

[16] A You want me to describe how a survey takes place?

Q Yes.

A From the point where we get our briefing, either in the office or out in the field, assignments are made as to where the men are going to be positioned and from there we proceed to the location.

Q How would the men be positioned? Was there some sort of pattern that was followed?

A Yes, depending on where the men would be going into the factory.

Q And were men generally positioned at the exits and entrances by which people could flee?

A Yes.

Q Or through which people could flee?

A Yes.

Q For what purpose were they stationed there, if you know?

A They were stationed there for a number of reasons; one, to observe what was going on if the door was open, if they are standing on the outside observing inside. Another is to sort of keep people from—maybe people who might be considered to be illegal aliens, from coming out through the exits.

\* \* \* \* \*

[24] Q So far as you knew during the time you worked in area control, Mr. Tellez, was it the policy of INS to interview all employees who worked for the factory during the factory survey or only those suspected of being illegal aliens?

A It was the policy to interview all of the employees at the factory.

Q What about yourself? You say there were many people that you did not interview.

A Well, we didn't necessarily interview everyone, [25] depending on our own personal observation of the people there.

Q Okay. In other words, you were to interview all people who you suspected of being illegal aliens; is that right?

MR. FENTON: Objection; leading.

MS. MUNGER: Let me rephrase the question.

Q You say that the policy was to interview all aliens.

MR. FENTON: Objection.

MS. MUNGER: Let me try that again.

Q Have you any explanation for why the officers made it a practice not to interview all employees if it was, as you say, the policy of the Immigration Service to interview all employees?

MR. FENTON: Objection. That is assuming facts not in evidence. He simply said that he didn't interview all the people that he encountered, and it is also leading.

MS. MUNGER: I am just asking the witness for an explanation and I think he may answer the question.

MR. FENTON: Yes.

THE WITNESS: I didn't question all the people that I encountered inside the factory but it was our understanding that when we go to a factory we will try to interview everybody, black, white, brown—it doesn't matter what color skin because there could be aliens that are white skinned from other countries; right? Once we get to the factory, then we decide by observing the different individuals whether [26] it is necessary to question one or not, or question the other.

Q BY MS. MUNGER: Can you give us a little bit of an elaboration of what you understand by the INS policy to question all employees within a factory?

A We were not to discriminate against any one particular person or race. That is why we would go in with the thought of interviewing all the employees in that building or location.

Q You mentioned at the beginning of your testimony the factors about the way people dressed. Do you remember that testimony?

A Yes.

Q In determining who to interview once you were inside the factory, did you take into account those same factors of dress that you described for us?

A Yes, I would.

Q You described the pants that illegal aliens tend to wear.

Can you think of anything about the shirts that they wear that is of interest to you in determining who to question?

MR. FENTON: Object to that as leading.

MS. MUNGER: Please answer the question.

THE WITNESS: I can't say anything about what type of shirts, whether they are different from others or not.

\* \* \* \* \*

[28] Q How did your ability to identify these different accents help you in identifying persons to approach during a factory survey?

A Well, putting all that experience together, I would recall, in talking to these people at these factories, well, the different types of accents.

Q If you came across a person who spoke with a Honduran accent, what did that mean to you in terms of whether or not you were likely to ask him a question about his citizenship status?

A Well, that coupled with the person's appearance again would give me the basis of believing that the person would be an alien.

Q During the course of any factory survey that you participated in did you see any person attempting to flee from the factory?

A Yeah.

Q Was that a common occurrence?

A Yes, it was.

Q Were these agents that were stationed at the exists, stationed outside the factory in proximity to the exits?

A Yes, they were.

Q Did you ever see any of these persons who were stationed near the exits attempt to apprehend any person who had fled from the factory?

A Well, it depends on—there were people that—[29] like when I was stationed at one of these exits during the time we were there, if there would be a time for them to have their coffee break, they would all come out all at once, just about. They we would move back and just observe the people because they would be going to a coffee truck that would not always park close to the entrance and exit of the factory and we would just observe the people and we didn't—obviously if somebody was just walking off like if they were going out of the parking lot away from the location that indicated to me that that person was supposed to be working but why are they taking off.

Q On the occasions when you saw the people leaving the factory to go outside to the coffee truck, was any effort made to stop them as they left?

A Well, at the time they are coming out I would observe, once in a while, one or two officers stop somebody and question them, question one or two people, I don't know how many but the majority of them would just be permitted to go to the coffee truck.

Q Did you ever see a person run out the door of a factory and then be pursued by a person who was standing—an officer who was standing near the exit?

A Yes. I had that experience.

Q Do you remember that your testimony was that one of the purposes that the officers were stationed at the exits was to keep illegal aliens from fleeing? Do you remember that testimony?

A Yes.

[30] Q What did you mean by that testimony?

A Well, because the people would know that Immigration was there and if it was known, some people would have a tendency to try to leave the location. I had one experience where I had one person just come running out of the location and I ran after that person and that person was running toward the parking lot where there was some vehicles parked and as soon as the person stopped at the vehicle I indicated to the person who I was and the person said, "Well, I am just coming to my car to get something out of the vehicle" and I stood by and watched the person and then the person would walk back to the factory. Others, of course, if they continued to keep on running as if they are going to leave the location, then I would actually pursue the person until I actually was able to stop them.

. . . . .

SUPREME COURT OF THE UNITED STATES

No. 82-1271

IMMIGRATION and NATURALIZATION SERVICE,  
ET AL., PETITIONERS

*v.*

HERMAN DELGADO, ET AL.

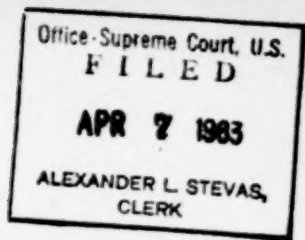
ORDER ALLOWING CERTIORARI

Filed April 25, 1983

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.



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No. 82-1271  
IN THE

# Supreme Court of the United States

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October Term, 1982

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IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,  
*Petitioners,*

*vs.*

HERMAN DELGADO, *et al.*,  
*Respondents.*

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## BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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HENRY R. FENTON,  
(Counsel of Record),  
GORDON K. HUBEL,  
LEVY & GOLDMAN,  
3550 Wilshire Blvd.,  
Suite 1020,  
Los Angeles, Calif. 90010,  
(213) 380-3140,  
MAX ZIMNY,  
1710 Broadway,  
New York, New York 10019,  
(212) 265-7000,  
*Attorneys for Respondents.*

**Question Presented.**

Whether INS agents violate the Fourth Amendment when, without cause to suspect any particular individual employed in a workplace of being an illegal alien, they enter the workplace in numbers and without warning and conduct a "survey" by stationing armed agents wearing badges at the workplace exits, handcuffing and arresting those workers who attempt to leave in plain sight of the rest of the workforce, and methodically detaining and questioning the workforce for one to two hours.

## TABLE OF CONTENTS

	Page
Question Presented .....	i
Constitutional Provision Involved .....	1
Statement .....	1
Argument .....	6
Conclusion .....	21

## INDEX TO APPENDICES

- Appendix A. Opinion of The Court of Appeals for the Ninth Circuit Is Reversed and Remanded.
- Appendix B. Order — Petition for Rehearing Is Denied.

## TABLE OF AUTHORITIES

Cases	Page
Adams v. Williams, 407 U.S. 143 .....	16
Almeida-Sanchez v. United States, 413 U.S. 266 (1973) .....	7, 12, 17
Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir. 1971) ...	17
Babula v. INS, 665 F.2d 293 (1981) .....	20
Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211 (D.C. Cir. 1981) .....	20
Brown v. Texas, 443 U.S. 47 .....	8, 15, 16
Camara v. Municipal Court, 387 U.S. 523 (1967) ....	19
Carpenter v. Hall, 311 F.Supp. 1099 (D.C. Texas 1970) .....	10
Delaware v. Prouse, 440 U.S. 648 .....	16
Florida v. Royer, — U.S. — (1983), No. 80- 2146 .....	7, 8, 15
Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977) .....	17
ILGWU v. Sureck, 681 F.2d 624 (9th Cir. 1982) ....	17
Lee v. INS, 590 F.2d 497 (3d Cir. 1979) .....	17
Mercy v. First Republic Corp. of America, 43 F.R.D. 465 (D.C. N.Y. 1968) .....	10
Michigan v. Summers, 45 U.S. 692 .....	16
Ojeda-Vinales v. INS, 523 F.2d 286 (2d Cir. 1975) ..	17
Reid v. Georgia, 448 U.S. 438 .....	8, 9, 15, 16
See v. City of Seattle, 382 U.S. 541 (1967) .....	19
Shulman v. Ritzenberg (D.C. D.C. 1969) 47 F.R.D. 202 .....	10
Terry v. Ohio, 392 U.S. 1 .....	16, 19

United States v. Beal, 624 F.2d 1327 (9th Cir. 1982)	9
United States v. Brignoni-Ponce, 422 U.S. 873	7, 8, 11, 12, 14, 15, 16, 17, 18
United States v. Cortez, 449 U.S. 411	8, 12, 16, 18, 19, 20
United States v. Heredia-Castillo, 616 F.2d 1147 (9th Cir. 1980)	19
United States v. Mendenhall, 446 U.S. 544 (1980)	8
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	11, 12, 14
Constitution and Statutes	
Fourth Amendment	i, 1, 6, 7, 16, 17, 18, 19, 20
8 U.S.C. §§ 1324-1325	2
8 U.S.C. § 1357(a)(1)	7, 17
FRCP 23(a)(4)	10

No. 82-1271  
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October Term, 1982

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IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,  
*Petitioners,*  
  
vs.  
  
HERMAN DELGADO, *et al.*,  
  
*Respondents.*

---

**BRIEF IN OPPOSITION TO THE  
PETITION FOR WRIT OF CERTIORARI.**

---

**Constitutional Provision Involved.**

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Statement.**

The respondents filed two actions which were subsequently consolidated challenging the Immigration and Naturalization Service's (INS) practice of carrying out workplace raids (referred to as "surveys" by the INS) in the greater Los Angeles area. Respondents contended that the surveys violated the Fourth Amendment rights of innocent

workers who were detained and interrogated in the surveys. After the District Court for the Central District of California granted summary judgment in favor of the defendants, the Court of Appeals for the Ninth Circuit reversed and remanded (App. A, *infra*, 1a-43a). A petition for rehearing was denied on September 30, 1982 (App. B, *infra*, 44a). No judge of the Ninth Circuit requested a vote on the INS's suggestion for a rehearing en banc (*Id.*).

A. The particular focus of this lawsuit was three surveys, two conducted in January and September 1977 at Southern California Davis Pleating (Davis Pleating) and the third at Mr. Pleat in October 1977.<sup>1</sup>

Petitioners have not at any time prior to the filing of the petition disputed the material facts in this case and have reiterated in their petition (p. 2) that the facts are not in dispute. Although the INS apprehended 78 and 39 illegal aliens respectively in the surveys of January and September 1977 at Davis Pleating, more than 220 innocent workers in the first survey and 150 in the second were subjected to the surveys (App. A, *infra*, 4a). The INS entered the premises at Davis Pleating pursuant to search warrants but conceded in oral argument that it relied on the warrants only to justify the initial entry into the workplace<sup>2</sup> (App. A, *infra*, 9a n. 8).

---

<sup>1</sup>The record in this case contains affidavits by the individual respondents and other workers describing the three surveys in question. It also includes depositions of the individual respondents and ten INS supervisory investigators and investigators, relating to the manner in which these surveys and others like them were conducted.

<sup>2</sup>The warrants, issued pursuant to 8 U.S.C. §§ 1324 and 1325, were challenged by respondents as unconstitutional general warrants because they gave no names nor descriptions, but authorized a search for "certain property, namely, persons, namely, illegal aliens. . . ." The affidavits in support of the warrants contained unsubstantiated hearsay statements from aliens apprehended while attempting to enter Davis Pleating that they "believed" other illegal aliens were employed there, and also upon a statement by the INS investigator affiant that he personally "noted that twenty persons of apparent Latin decent [sic] entered [the Davis premises] through the West door" (App. A, *infra*, 58a n. 5). The court of appeals found it unnecessary to address the constitutionality of the warrants because of the INS concession that the warrants did not purport to authorize the surveys themselves (App. A, *infra*, 9a n. 8).



The survey at Mr. Pleat was carried out without a warrant but was otherwise indistinguishable from the surveys at Davis Pleating and, indeed, from typical INS surveys. The Davis Pleating and Mr. Pleat surveys were carried out in a systematic way, precisely for the purpose of making it clear to the workers that they were subject to INS authority and were thus compelled to cooperate. The survey process as it was reflected in the record was described by the court of appeals:

[T]he survey process often begins with workers' cries of 'la migra' (the Immigration) followed by attempts by some workers to hide or run from INS officers conducting the survey. Disruption of the workplace usually occurs (App. A, *infra*, 4a).

[T]he appellants noticed the presence of the INS at the factories immediately as the survey began. The appellants indicated that they were aware that the agents stationed at the exits physically prevented many workers from leaving.<sup>3</sup> In addition, the number of INS investigators, wearing badges and handcuffs, gave the workers the impression that they were tacitly under the detentive powers of the INS for the duration of the survey (*Id.* 19a).

The investigators' authority was announced verbally and the display of INS badges worn by the investigators served as a continual reminder of that authority. Agents stationed at exits indicated to the entire workforce that

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<sup>3</sup>Although petitioners dispute the fact that agents prevent workers from leaving the factory during the surveys (n. 2) the record itself is undisputed. "Officers are usually stationed at various entrances and exits to guarantee that individuals will not escape" (July 5, 1978 affidavit of Philip Smith, C.R. 14 at 3). Thus the court of appeals found that INS agents are stationed at "exits and entrances to prevent persons from leaving the workplace" (App. A, *infra*, 4a).

departures were not to be contemplated. Some agents carried handcuffs and used them to detain those apparently suspected of being in this country illegally.<sup>4</sup> The operation unfolded with surprise and resulted in sustained disruption of the working environment. The element of surprise was used to prevent undetected departures, and the methodical execution of the operation with a line of agents proceeding down the rows of workers could reasonably be viewed as a threatening presence<sup>5</sup> (*Id.* at 19a-20a).

Although most employees remained at their work stations during the surveys, the work effectively came to a standstill, with employees going through the motions of working. Many of the employees were visibly shaken and some were crying (Delgado Dep. 58; Correa Dep. 57).

B. The individual respondents are Herman Delgado, Ramona Correa, Francis Labonte and Maria Miramontes; respectively, two native-born citizens of Hispanic ancestry, and two lawful resident aliens. Delgado, Correa and Labonte were employed at Davis Pleating and Miramontes was em-

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<sup>4</sup>The workforce at Davis Pleating observed that those persons who were handcuffed were treated roughly by the INS agents (Declaration of Georgia Wren, C.R. 1; Labonte Dep. 44). In addition to the obtrusive features of the surveys noted by the Ninth Circuit, the record also reflected that the INS agents were armed and that some carried walkie talkies (Clarín Dep. 109; Smith Dep. 111).

<sup>5</sup>Petitioners dispute the fact that agents are instructed to question each worker because they have misconstrued the court of appeals' decision and the record. The court of appeals did not state that agents are instructed to question each worker as to his citizenship, but only that they are instructed to question each worker. The record establishes that "Immigration officers during the survey usually speak to virtually all persons employed by a company to either ascertain a person's immigration status or to seek information from that person" (Affidavit of Philip Smith, C.R. 14 at 3). Further, the INS conceded in discovery that during the course of surveys, agents do not restrict their questioning regarding a person's citizenship to individuals they reasonably suspect of being aliens or illegal aliens. (Answers to Fourth Set of Interrogatories, No. 6, C.R. 110, pp. 75, 100.)

ployed at Mr. Pleat. Delgado, Correa and Miramontes were all supervisors, with no fixed work location. During the surveys they walked to various locations within the factory in order to quiet down the frightened workforce (Delgado Dep. 53; Correa Dep. 57). Delgado and Correa avoided INS questioning in the January survey, being virtually the only employees of Hispanic ancestry who were not questioned,<sup>6</sup> because of their supervisory status (Correa Dep. 46; Delgado Dep. 60). Each of them was questioned, however, in the September survey about their places of birth. In that survey, after Delgado and another employee were questioned, the INS agents stated that when they came back on another date, they would have to check Delgado and the other employee out more thoroughly because they spoke English too well (Delgado Dep. 79). Respondent Labonte stepped outside the factory only after questioning had already been completed. Angry about what had taken place and concerned for those people who had been taken outside, she went out to observe how the workers who had been handcuffed and transported out of the factory were being treated (Labonte Dep. 37, 51). Respondent Miramontes was questioned in the survey at Mr. Pleat. She testified that she wanted to leave but was too frightened to do so (Miramontes Dep. 36).

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<sup>6</sup>In the Davis Pleating surveys, employees who were not Hispanic, including Black, Oriental and non-Hispanic Caucasian employees, were not questioned (Delgado Dep. 52, 82-83; Labonte Dep. 58-59).

## ARGUMENT.

The INS surveys in question are by their nature repugnant to the essence of the Fourth Amendment. Unlike the line of cases decided by this Court which have permitted Border Patrol agents to stop and briefly question persons near the border in the absence of other practical alternatives to policing the border, this case concerns a recently conceived INS enforcement strategy which focuses upon urban areas in the center of our country, and which is designed to apprehend illegal aliens after they have already been assimilated into the resident population of our cities. The INS rationale for the workplace surveys is that they are the most efficient method of apprehending illegal aliens after they have taken up residence in this country, given the understaffed nature of INS district offices in areas away from our international borders. It is submitted that the INS's law enforcement interest is far outweighed by the right of our citizens and lawful residents working in factories and offices to be protected from the highly intrusive operations that characterize INS workplace surveys.

The petition presents a distorted picture of the court of appeals' decision by focusing on only one portion of what the court found objectionable about INS surveys and then by mischaracterizing that portion of the opinion and the record. Thus, it was not only that the INS stationed agents at the exits and entrances to prevent workers from leaving the workplace that the court condemned in its opinion; it was the entire *modus operandi* of the surveys, resulting in an atmosphere of fear and confusion among the entire workforce that the court focused upon. The sealing of the exits and entrances cannot be separated from the other offensive features of the surveys, beginning with the surprise entry into the workplace by a large number of agents wearing badges and carrying handcuffs and walkie talkies (App. A,

*infra*, 19a-20a; Delgado Dep. 76; Miramontes Dep. 13). The workers' emotions were heightened further by cries of "la migra" (the Immigration) as the officers entered, and by the apprehension and handcuffing of individuals who attempted to flee. Further, the officers' verbal announcement of their authority and the methodical way in which they carried out the survey, proceeding up and down the rows of workers, was clearly designed to apprise the workers that they were required to remain and cooperate (App. A, *infra*, 19a-20a).

Although the petition suggests that the decision of the court of appeals cast doubt on traditional police practices directed at apprehending criminals, the decision had absolutely nothing to do with traditional law enforcement activities. This case is *sui generis* because the surveys are unprecedented in their repressive features and their broad scope. They capture and detain entire workforces, sometimes numbering several hundred persons at once, without reason to suspect even a single particular individual of wrongful activity. They cannot be compared to legitimate law enforcement activities designed to apprehend criminals.

The petition also seeks to inject an issue about the constitutionality of a federal statute into this case, but the court of appeals' decision never raised any such question. To the contrary, the court's interpretation of 8 U.S.C. 1357(a)(1) was in conformity with previous decisions of this Court. *United States v. Brignoni-Ponce*, 422 U.S. 873, *Almeida-Sanchez v. United States*, 413 U.S. 266. Further, though the petition asserts that the decision is in conflict with a decision of another court of appeals, no other decision has considered the constitutionality of INS workplace surveys as a whole. The decision is in the mainstream of Fourth Amendment decisions by this Court and adheres closely to this Court's guidelines. *Florida v. Royer*, \_\_\_ U.S. \_\_\_

(1983), No. 80-2146; *United States v. Brignoni-Ponce*, *supra*; *United States v. Cortez*, 449 U.S. 411; *Michigan v. Summers*, 452 U.S. 692; *Reid v. Georgia*, 448 U.S. 438; *Brown v. Texas*, 443 U.S. 47. Therefore, no need exists for review by this Court and the petition should be denied.

A. 1. Petitioners rely upon an erroneous premise when they assert that the court of appeals erred in holding that the stationing of agents at exits during a factory survey constituted an illegal seizure of the workforce. It was the entire execution of the surveys that was the basis of the holding that the workforce was unlawfully seized. *cf. Florida v. Royer, supra*. Thus, under the test set forth by Justice Stewart in *United States v. Mendenhall*, 446 U.S. 544, 550 (1980), the question is whether a reasonable person would have believed that he was not free to leave under all of the manifestations of authority that characterized the workplace surveys. It is submitted that it would have been obvious to any reasonable person that he was not free to leave because of the sudden entry of a large number of INS agents, the apprehension and handcuffing of persons who attempted to leave, the display of badges and handcuffs, and the methodical manner in which the INS agents carried out the surveys. As the court of appeals stated:

When comparing *Mendenhall* to this case, we note that, in addition to being questioned as to their citizenship status, the workers at the factory in the present case were subjected to a procedure that included the intrusive aspects noted throughout this opinion; i.e., the threatening presence of a number of INS investigators, some stationed at exits, others carrying out the survey by proceeding methodically down the rows of workers. The detentive environment created in the surveyed factories in this case is quite different from the casual stopping and questioning involved in *Menden-*

*hall, Reid v. Georgia*, and our recent decision in *United States v. Beal*, 624 F.2d 1327, 1329-30 (9th Cir. 1982) (App. A, *infra*, 31a-32a).

Petitioners' assertion that the employees were not free to leave during the surveys because they were required to be at work totally misses the point. In our free society, an individual may choose to work or not to work; therefore, in the absence of the show of authority that accompanied the surveys, workers would have been free to completely avoid the surveys by leaving the factory. The reality of the situation was that the factories came to a standstill during the commotion that accompanied the surveys. The workers were too frightened to work, but were intimidated into remaining at their work stations by the show of force that they observed going on around them.<sup>7</sup> Although the surveys themselves took an hour and one-half or two hours,<sup>8</sup> the workers remained upset and frightened at the mere mention of the term "INS" for days or weeks afterwards.<sup>9</sup>

The petitioners assert that the court of appeals found that during the surveys the employees were free to walk through or exit the factory, but the court of appeals' findings were

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<sup>7</sup>"They were working but they were scared. The whole factory was put to a stop, standing still" (Delgado Dep. 58).

"They were looking around to see what was going on. They weren't really concentrating on their work, which is something that nobody did after that" (Correa Dep. 57). When Ms. Correa, a supervisor, was asked for how long she had to go around the factory calming down employees, she testified: "Maybe a half hour, 45 minutes, because it was a matter of talking to them. 'Come on, relax. It's o.k. They're going away. They're not here anymore. Just forget it.' So I had to calm them down, because some were crying. They didn't take them. They didn't do anything but ask them questions, but they were still crying." (*Id.*)

<sup>8</sup>Affidavit of Philip H. Smith of November 1978, ¶ 10; Dep. Delgado, pp. 50, 62.

<sup>9</sup>Dep. Correa, p. 75; Dep. Miramontes, p. 48.



precisely to the contrary (App. A, *infra*, 19a).<sup>10</sup> The petitioners' suggestion that those employees who were citizens or lawful residents should have felt free to leave is naive at best. As the record clearly shows, INS agents were stationed at the exits to prevent anyone from leaving. As would-be class representatives, the individual plaintiffs could have been expected to have been more courageous and assertive than the average worker.<sup>11</sup> But even the plaintiffs, three out of four of whom were supervisors, were afraid. As Maria Miramontes testified: "Because if I leave and they think I don't have no papers and they shoot me or something. They see me leaving and they think I'm guilty" (Miramontes Dep. 36).

Contrary to petitioners' assertion that respondent Correa testified that citizens or aliens legally present in this country felt free to leave, Correa testified that while objectively people "don't have anything to fear," the workers are nonetheless afraid. "You can see it in their faces, their reactions, their behavior, which is very upsetting to the company. It's

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<sup>10</sup>Petitioners apparently rely upon a portion of the court's discussion taken out of context, which states, "The record indicates that regardless of the fact that some of the aforementioned appellants had varying degrees of freedom to circulate through or exit the factories, the number of INS investigators employed during the surveys and the method of survey execution represented a threatening presence of INS agents to the reasonable worker."

One of the plaintiffs stepped outside to observe out of anger and concern about the workers who were taken out of the door (Labonte Dep. 51). The other three individual plaintiffs were supervisors who were responsible for calming down the workers and only Delgado (after he himself was questioned) stepped out of the factory to supervise the loading of a truck after the owner's son requested INS agents to remove a van that was blocking the loading dock (Delgado Dep. 85).

<sup>11</sup>Pursuant to FRCP 23(a)(4), a representative party is expected to be a forceful advocate able to defend class interests with forthrightness and vigor. *Shulman v. Ritzenberg*, 47 F.R.D. 202, 207 (D.C. D.C. 1969); *Carpenter v. Hall*, 311 F.Supp. 1099, 1114 (D.C. Texas 1970); *Mercy v. First Republic Corp. of America*, 43 F.R.D. 465, 470 (D.C. N.Y. 1968).



very upsetting for the production and for me, management'' (Correa Dep. 76).

2. Petitioners' reliance on *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), is misplaced. In that case, the Court permitted a limited exception to the general doctrine that an investigatory stop must be justified by objective manifestations that the person stopped is or is about to be engaged in criminal activity for a fixed checkpoint operated by the Border Patrol at or near intersections of important highways leading away from the border for the purpose of interdicting the flow of illegal traffic from Mexico. This Court was careful to emphasize that such checkpoints were permissible only because they would not subject the residents of border areas to "potentially unlimited interference with their use of the highways," as was characteristic of roving patrol stops. As this Court stated:

Routine checkpoints do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. 428 U.S. at 559.

The court of appeals correctly held that the surveys in this case resemble the roving stops disallowed in *United States v. Brignoni-Ponce*, *supra*, far more than the permanent checkpoints at issue in *United States v. Martinez-Fuerte*, *supra*. As the court of appeals stated:

[T]he record in the instant case contains evidence that the factory surveys were quite frightening to the workers, leaving many in a state of anxiety over perceived recurrence of the surveys at subsequent arrests. Instead of the three or four minute routine detention in *Martinez-Fuerte*, the record in this case indicates a relatively greater degree of disruption from the surprise entry of the workplace for the typical hour and one-half of questioning and for some time thereafter. Moreover, the actual implementation of the factory surveys in the instant case suggests more random enforcement, giving greater discretion than is involved in the checkpoint operation. By securing exits and systematically proceeding in a line down rows of workers, the INS factory survey compares more to an unannounced automobile checkpoint located and operated by surprise wherein all motorists are detained for an hour and one-half, while the agents systematically scrutinize all detained motorists and passengers, choosing those the agents wish to question. The factors involved in a permanent checkpoint on highways that balance against impermissible discretionary law enforcement, *i.e.*, no surprise, short duration, minimal disruption, are simply not present in the instant case. (App. A, *infra*, 34a.)

Another very significant difference from *Martinez-Fuerte* in this case is the absence of the overriding policy of securing our international borders to prevent the entry of illegal aliens at issue in *United States v. Martinez-Fuerte* among a line of cases decided by this Court. *United States v. Cortez*, 449 U.S. 411; *United States v. Brignoni-Ponce*, *supra*; *Almeida-Sanchez v. United States*, *supra*. In contrast to those cases, here the INS has embarked upon a program to trap populations of workers by surprise in large urban areas in the interior of our country for the purpose of possibly apprehending some undocumented workers who have unlawfully

taken up residence. To achieve this objective, the INS necessarily conducts these raids in a roving manner resulting in the apprehension of some undocumented workers, but also resulting in widespread violation of the rights of innocent workers who are subjected to the raids. These surveys pose a far greater danger to the public than the automobile stops in the vicinity of our borders at issue in previous cases decided by this Court without a comparable public interest.

Petitioners' assertion that the workers were free to go about their business during the surveys is totally belied by the facts of this case as determined by the court of appeals showing that work was totally disrupted during the entire hour and one-half of questioning, and for some time thereafter. Moreover, petitioners' statement that the individuals could leave after they were questioned is also contrary to the record and to the court of appeals' decision. Petitioners' assertion that individuals legally in this country could not have been nervous or apprehensive is illogical. First, it was not announced, nor otherwise communicated, to the workforce that INS agents were there only to arrest illegal aliens. Even if one were to assume that workers subjected to surveys know that the INS agents are interested only in apprehending illegal aliens, that in no way lessens the fact that all workers are detained during the hour and one-half period during which the survey takes place. Moreover, all workers are afraid even if they know that the INS agents are looking for illegal aliens, that they might be arrested in the event they are mistaken for illegal aliens, or are disbelieved about their citizenship. A perfect example is presented by respondent Delgado's experience involving agents who were skeptical of his responses to their interrogation and who threatened to check him out further. It is obvious that any reasonable person would be afraid that he would be caught up in the questioning and confusion attending factory surveys and

arrested even though he was a citizen or a lawful resident alien. Contrary to petitioners' assertion, individuals detained and interrogated in surveys are less aware of the reasons that they have been singled out than individuals stopped and interrogated at a checkpoint because drivers approaching a checkpoint know in advance that they may be singled out because of suspicion of illegal alienage while workers subjected to surveys have no such warning.

Despite petitioners' attempt to broaden the impact of the court of appeals' decision, it has no bearing upon cases involving police roadblocks, because totally different considerations and policies are involved. *United States v. Martinez-Fuerte*, 428 U.S. at 543, 560 n. 14.<sup>12</sup>

B. The Ninth Circuit's conclusion that workers may not be detained in the course of surveys unless they are suspected to be illegal aliens does not constitute a basis for review since it is in complete conformity with previous decisions of this Court, which have clearly stated the applicable test. In *United States v. Brignoni-Ponce*, 422 U.S. at 884, this Court held that Border Patrol officers on roving patrol may stop vehicles on roads near the border "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." Although this Court reserved the question of whether Border Patrol officers may also stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country, the reasoning of that decision suggests that the same standard

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<sup>12</sup>Thus, in *United States v. Brignoni-Ponce*, this Court expressly distinguished cases involving the policing of border areas by the Border Patrol from limited stops by state and local law enforcement agencies "to enforce laws regarding driver's licenses, vehicle registration, truck weights and similar matters." 422 U.S. at 884, n. 8.

would apply for non-vehicular stops or detentions. As this Court stated, a requirement of suspicion of illegal alienage is necessary at a minimum to justify roving patrol stops in border areas in order to protect the residents of those areas from "potentially unlimited interference with their use of the highways, solely at the discretion of border patrol officers." 422 U.S. at 882. A far greater need to curb potential abuse of discretion by INS agents exists in this case because far greater numbers of innocent people are subject to detention for a much longer period of time than the minute or two involved in *Brignoni-Ponce*, *supra*, and under more frightening circumstances. Moreover, the overriding justification in *Brignoni-Ponce* of the absence of practical alternatives to police the borders is totally absent in this case. In sum, *Brignoni-Ponce* permitted stops on facts that did not amount to the probable cause required for an arrest only "because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, . . ." 422 U.S. at 881. Even so, at least reasonable cause to suspect illegal entry was required by this Court to guard against the abuse of official discretion.

In subsequent cases, this Court has removed any doubt that in order to justify seizures of the person short of a traditional arrest, any law enforcement agency must at least have reasonable cause to suspect some criminal activity. *Florida v. Royer*, *supra*. As this Court stated in *Reid v. Georgia*, 448 U.S. 438, 440:

While the Court has recognized that in some circumstances a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. See *Brown v.*

*Texas*, 443 U.S. 47, 51; *Delaware v. Prouse*, 440 U.S. 648, 661; *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams v. Williams*, 407 U.S. 143, 146-149; *Terry v. Ohio*, 392 U.S. 1.

The court of appeals' analysis was directly in line with the Court's decisions:

The element of illegality contained in the standard has been suggested by recent Court pronouncements of Fourth Amendment standards applicable to brief detentions short of formal arrests. In *Michigan v. Summers*, the Court discussed its precedent permitting minimal intrusions and stated:

These cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, *so long as police have an articulable basis for suspecting criminal activity*.

452 U.S. at 699, 101 S.Ct. at 2592 (emphasis added). In *United States v. Cortez*, *supra*, the Court stated that 'the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.' 449 U.S. at 417-18, 101 S.Ct. at 694-95.\*

\*See also *Brown v. Texas*:

'[E]ven assuming that [prevention of crime is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it.'

*Id.* 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed. 2d 357 (1979) (App. A, *infra*, 30a).

The decisions of the circuit courts of appeals have largely been in conformity with the decisions of this Court and do not justify review. Thus, the Ninth Circuit, the District of Columbia Circuit, the Second Circuit and the Seventh Circuit have held that if an intrusion amounts to a seizure under the Fourth Amendment, then INS agents must be able to articulate a reasonable suspicion that the person seized is an illegal alien in order to justify the seizure. *International Ladies Garment Workers v. Sureck*, 681 F.2d 624; *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir.), cert denied 404 U.S. 864 (1971); *Ojeda-Vinales v. INS*, 523 F.2d 286 (2d Cir. 1975); *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977) (*en banc*). Although the test may have been phrased somewhat differently in *Lee v. INS*, 590 F.2d 497, 502 (3d Cir. 1979), the court in that case also determined that a reasonable suspicion of illegal alienage existed to the extent that the alleged intrusion amounted to a seizure.

C. The court of appeals did not cast doubt on the constitutionality of 8 U.S.C. 1357(a)(1). To the contrary, the court of appeals construed that section in conformity with previous decisions of this Court. As the court stated:

We realize that our holding here limits section 1357(a)(1) questioning in the context of factory surveys of the nature presented by the facts of this case. But this is not the first time this statute has been so limited. The Court has held that section 1357(a)(1) cannot justify a constitutional violation, *Brignoni-Ponce*, *supra*; and we are mindful of the Court's more general admonition that 'no Act of Congress can authorize a violation of the Constitution.' *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (App. A, *infra*, 31a).

Petitioners' argument that it is reasonable to require aliens to produce proper documentation when requested to do so by INS officials totally misses the point made by this Court



in *Brignoni-Ponce*, *supra*, and by the court of appeals.<sup>13</sup> As the court of appeals stated:

The element of illegality contained in the standard is also required in order to minimize the effects of enforcement procedures felt by innocent workers. Our focus is not limited to a discussion of the rights of aliens. As the Court noted in *Brignoni-Ponce*:

Although we may assume for purposes of this case that the broad Congressional power over Immigration, . . . authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in this country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. (422 U.S. at 883-84.)

The status of alienage does not imply that any particular alien is in this country illegally (App. A, *infra*, 30a-31a).

D. Petitioners' assertion that the court of appeals created a new requirement by requiring that suspicion of illegality must be individualized is erroneous; to the contrary, the court of appeals relied upon *United States v. Cortez*, 449 U.S. 411 (1981), which specifically so held. As this Court stated in *Cortez*:

Based upon [the] whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity (citations omitted).

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<sup>13</sup>Although petitioners contend that INS agents have been instructed to detain individuals for questioning only on the basis of a reasonable suspicion of illegal alienage, in answer to an interrogatory, the INS admitted that individuals are questioned about their alienage in surveys regardless of whether they are suspected of illegal alienage or, indeed, of alienage. Answers to Fourth Set of Interrogatories, No. 6, C.R. 110, pp. 75, 100.



The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements,

. . . .  
. . . .

The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrong doing. Chief Justice Warren, speaking for the Court in *Terry v. Ohio*, *supra*, said, '[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence.' 449 U.S. at 417-418.

*Camara v. Municipal Court*, 387 U.S. 523 (1967), also relied upon by petitioners, is inapposite. In *Camara*, this Court held that area code enforcement inspections supported by a warrant are not violative of the Fourth Amendment because the inspections are "neither personal in nature nor aimed at the discovery of evidence of crime," have a long history of judicial and public acceptance dating back to revolutionary days and are necessary for the public health and safety. 387 U.S. at 537; Cf. *See v. City of Seattle*, dissenting opinion, Clark J., 382 U.S. 541, 547 (1967). The workplace surveys are personal in nature, involve a substantial intrusion on the privacy of workers subjected to the surveys, and are not supported by any comparable public interest.

When the Border Patrol stops a vehicle in a border area, neither the driver nor any of the passengers may be questioned in the absence of reasonable cause to suspect the particular persons being questioned of being illegal aliens. *United States v. Heredia-Castillo*, 616 F.2d 1147, 49 (9th Cir. 1980); see *United States v. Cortez*, 449 U.S. 411

(1981). In order to police our borders, the Border Patrol must necessarily stop vehicles containing persons reasonably suspected to be illegal aliens, even if not all of the occupants are suspected illegal aliens.<sup>14</sup> But it is not necessary to detain hundreds of innocent workers in order to interrogate a single suspected illegal alien or a number of suspected illegal aliens through workplace surveys, nor do surveys serve the policy of policing our borders.

Although petitioners assert that *Babula v. INS*, 665 F.2d 293 (1981), is in conflict with the court of appeals' decision, it is distinguishable. In *Babula*, the court acknowledged the general constitutional requirement that detentive questioning may not occur without individualized suspicion but held that an exception existed under the facts of the case since employees were not questioned selectively but, rather, all employees were questioned. 665 F.2d at 296-297. In this case, not all employees were questioned (App. A, *infra*, 37a). The decision in *Babula* is also inapplicable because it does not appear that the appellants raised nor did the court consider the factory survey in its entirety from a Fourth Amendment perspective. The focus of the court was only upon the fact that that agents surrounded the factory.

*Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir 1981), cert. denied, 455 U.S. 940 (1982), relied upon by petitioners, is also distinguishable because the court held that the administrative search warrant in that case permitted the INS agents to enter the factory without addressing the question of whether the workers inside the factory were seized within the meaning of the Fourth Amendment. Similarly, in this case, "the INS admitted during oral argument

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<sup>14</sup>Border Patrol stops will often involve cases of illegal smuggling where all of the occupants of the vehicle that is stopped are suspected to be illegal aliens. Cf. *United States v. Cortez*, 449 U.S. 411 (1981).

that reliance on the warrants was limited to justification for the initial entry into the workplaces'' and it was unnecessary for the court of appeals to ''pass judgment upon the propriety of the INS's use of such search warrants'' (App. A, *infra*, 9a, n. 8).

**Conclusion.**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY R. FENTON,  
(Counsel of Record),  
GORDON K. HUBEL,  
LEVY & GOLDMAN,  
MAX ZIMNY,

*Attorneys for Respondents.*

APPENDIX A

INTERNATIONAL LADIES' GARMENT WORKERS' UNION,  
AFL-CIO; HERMAN DELGADO; RAMONA CORREA;  
FRANCIS LABONTE; AND MARIA MIRAMONTES, ON  
BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY  
SITUATED, PLAINTIFFS-APPELLANTS,

v.

JOSEPH SURECK; WILLIAM FRENCH SMITH; \* LEONEL  
J. CASTILLO; AND THE IMMIGRATION AND  
NATURALIZATION SERVICE, DEFENDANTS-APPELLEES.

THE INTERNATIONAL LADIES' GARMENT WORKERS'  
UNION, AFL-CIO; HERMAN DELGADO; RAMONA  
CORREA; FRANCIS LABONTE AND MARIA  
MIRAMONTES, ON BEHALF OF THEMSELVES AND ALL  
PERSONS SIMILARLY SITUATED,  
PLAINTIFFS-APPELLANTS,

v.

JOSEPH SURECK; GIL CLARIN; JAMES ROBINSON,  
WILLIAM FRENCH SMITH; \* LEONEL J. CASTILLO; AND  
THE IMMIGRATION AND NATURALIZATION SERVICE,  
DEFENDANTS-APPELLEES.

Nos. 80-5054, 80-5153, 80-5035 and 80-5152.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 9, 1981.

Decided July 15, 1982.

On Appeal from the United States District Court for  
the Central District of California.

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\*Pursuant to Rule 43(c)(1) of the Federal Rules of Appellate Procedure, William French Smith has been substituted for Benjamin R. Civiletti as the defendant.

Before ANDERSON and NORRIS, Circuit Judges, and MUECKE, District Judge\*\*.

J. BLAINE ANDERSON, Circuit Judge:

This case presents another challenge to the methods used by the Immigration and Naturalization Service (INS) in its efforts to vigorously enforce the nation's immigration laws. Appellant International Ladies' Garment Workers' Union (ILGWU) and the named appellants appeal from district court rulings dismissing the ILGWU as a representational plaintiff, denying class certification, and denying two motions for summary judgment while granting cross motions for summary judgment in favor of the appellees (all referred to as "INS"). We reverse the summary judgment granted to the INS on the challenge to the detention and questioning.

### I. FACTS

Two actions, eventually consolidated, were filed in the district court requesting declaratory and injunctive relief from the INS' pattern and practice of conducting factory surveys or sweeps through factories and workplaces for purposes of locating illegal aliens.<sup>1</sup> Appellants challenge the INS activity as violative of the Fourth and Fifth Amendments.

\*\*The Honorable C. A. Muecke, Chief Judge, United States District Court for the District of Arizona, sitting by designation.

<sup>1</sup> Throughout this opinion, the term "illegal alien" refers to aliens who have entered this country and/or are found to be in this country in violation of the laws of the United States. In this category are aliens who enter without inspection, aliens who overstay their non-immigrant visas and passes, and any others who enter or remain in the United States in violation of immigration and other laws. For most purposes, the term is synonymous with deportable alien. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 553, 96 S.Ct. 3074, 3080, 49 L.Ed.2d 1116 (1976).

The record demonstrates that at the time this litigation was initiated, the INS concentrated its Area Control operations<sup>2</sup> at workplaces rather than in residential areas because of the agency's limited resources and its experience in successfully apprehending large numbers of illegal aliens employed in various factories, most notably in the garment industry. The record also indicates that the Los Angeles District Office of the INS was conducting approximately four factory surveys per week and, on occasion, more than 100 illegal aliens were apprehended in a single factory as a result of surveys performed at various establishments.

The record also describes the typical factory survey as one commenced when the INS receives information, sometimes from anonymous sources, that a particular workplace may be employing illegal aliens. In order to verify this information, INS agents place the suspected workplace under visual surveillance in an effort to determine from observations of the workforce entering and leaving the workplace whether the company does indeed employ illegal aliens. If their information is verified, the agents are instructed to request permission of the workplace owner or management for the INS to enter and question suspected illegal aliens with the ultimate objective of arresting those found to be in the country illegally and referring them to appropriate deportation proceedings. The INS reports that approximately 90% of the owners and managers consent to the surveys of their workforce; the INS obtains search warrants to enter premises without such consent.

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<sup>2</sup> Record references to Area Control define it as operations which are designed to locate and apprehend aliens illegally in the United States. Declaration of Phillip Smith, Assistant Director for Investigations, Los Angeles District Office of the Immigration and Naturalization Service; Exhibit A, C.R. 97. Factory surveys apparently are considered to be a category of Area Control.

The record is free of disputed issues of material fact, although varying characterizations of the events surrounding the typical factory survey appear. After receiving consent or pursuant to warrant, INS agents enter the workplace by stationing agents at exits and entrances in order to prevent persons from leaving the workplace.<sup>3</sup> The remaining agents proceed through the factory, questioning workers as to their citizenship status. While the officers and agents are instructed to be courteous and cause as little disruption as possible, the survey process often begins with workers' cries of "la migra" (the immigration), followed by attempts by some workers to hide or run from INS officers conducting the survey. Disruption of the workplace usually occurs. The officers are instructed to question each worker, although the INS admits that such a task is not often possible.<sup>4</sup>

Three particular surveys are challenged in this case. Search warrants were issued for two surveys conducted at the Southern California Davis Pleating Company (Davis) workplace, the first conducted on January 4, 1977, where 78 illegal aliens were apprehended, and the other conducted on September 27, 1977, where 39 illegal aliens were apprehended. The third challenged survey occurred at a firm known as Mr. Pleat on October 3, 1977, where the INS entered by consent of the owner and where 45 illegal aliens out of workforce of approximately 90 were arrested. Appellants Delgado and Correa, United States citizens, and appellant Labonte, a resident alien, were all subjected to INS questioning at the Davis plant during the September survey. Appellant Miramontes, a resident alien, was asked three questions during the October survey of Mr. Pleat.

<sup>3</sup> Affidavit of Phillip Smith; C.R. 14 at 3.

<sup>4</sup> *Id.*, at 4.



The search warrants for the Davis surveys were issued under Fed.R.Crim.P. 41 and did not state with particularity the names of any individual illegal aliens sought as the objects of the searches.<sup>5</sup> The INS entered the Mr. Pleat facility with the consent of the owner of the facility and not the consent of all of the workers. The record also indicates that during the Davis surveys, the INS agents did not question every worker as policy would usually dictate because manpower limita-

<sup>5</sup> The search warrants issued for the January and September 1977 surveys of the Davis facility do not state that particular named persons were the objects of the surveys, but merely state that the INS investigator who executed the affidavit in support of the warrant had reason to believe that on the Davis premises:

"there is now being concealed certain property, namely persons, namely illegal aliens which are the fruits and instrumentalities and evidence of violations of Title 8, United States Code, Sections 1324 and 1325, . . ."

E.R. at 110 and 413.

Both warrants were issued pursuant to information obtained by INS investigators through their surveillance of the Davis plant. The affidavit in support of the January 1977 survey did not list names of particular persons sought, but consisted of statements made by aliens apprehended while attempting to enter the Davis plant to the effect that they believed other illegal aliens were presently employed by Davis. In addition, the INS investigator affiant stated that he personally "noted that twenty persons of apparent Latin decent [sic] entered [the Davis premises] through the West door." E.R. at 113.

The affidavit in support of the September 1977 survey warrant contained information regarding an alleged complaint by one of the Davis citizen employees who said she could identify two named workers at Davis who had returned to work after having previously been deported as a result of the January survey. The same complainant suspected that many new hirees were illegal aliens "based on their behavior and comments." Finally, the affidavit stated that an illegal alien apprehended while approaching the outside of the Davis plant stated that she personally knew of four additional unnamed illegal aliens employed at the Davis plant.



tions prevented such a procedure in a factory employing 200-300 workers as did Davis at the time of the surveys. Instead, the workers chosen for questioning at the Davis surveys were selected with the agents' use of a combination of objective and subjective factors.<sup>6</sup>

As the labor organization certified as the exclusive representative of production and maintenance employees at the Davis and Mr. Pleat facilities, the ILGWU asserts its representational capacity to sue on behalf of its members under the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141, *et seq.* The ILGWU alleges that it represents thousands of garment workers, the majority of whom are of Latin ancestry employed in shops throughout the Central Judicial District of California. It alleges injury to itself and its members as a result of the INS factory surveys. Acting upon a motion filed by the INS, the district court ordered the Union dismissed from the litigation by an order filed on November 16, 1979, and entered as a final judgment under Fed.R.Civ.P. 54(b) on December 13, 1979. The Union appeals from this dismissal in Nos. 80-5035 and 80-5054.

The appellants' motion to certify a class consisting of "all persons of Latin ancestry or of a Spanish surname who are, will be, or have been employed in the garment industry or in any other industry in the Central Judicial District of California" was denied by Order entered May 31, 1979. Appellants appeal from this order in Nos. 80-5152 and 80-5153.

In December of 1979, the parties filed cross-motions for partial summary judgment on the issues of the con-

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<sup>6</sup> Some agents describe the selective process as one involving the use of factors which may indicate that a person is an alien; e.g., the person's clothing, facial appearance, hair coloring and styling, demeanor (i.e., anxiety or fright), language and accent, and a multitude of subjective factors that one agent described as "multisensory" factors.

stitutional validity of the search warrants and the validity of the surveys conducted with consent of only the owner of the Mr. Pleat workplace. On these issues, the district court found for the INS, holding the warrants valid as issued under Fed.R.Cr.Pro. 41(b)(4), containing sufficient particularity as to the persons to be seized and based upon sufficient probable cause. As an alternative holding, the district court found that the appellants lacked a sufficient privacy interest in their workplace to contest the surveys pursuant either to warrant or consent.

In January of 1980, the parties filed cross-motions for summary judgment on the remaining issues involving the propriety of the INS detention and questioning of workers during the surveys. On these issues, the district court again found for the INS, holding that the appellants were not arrested, detained or seized in a manner implicating the Fourth Amendment, that the INS properly conducted the questioning pursuant to statutory authority contained in 8 U.S.C. § 1357(a)(1), and that even if appellants had experienced some form of seizure by the placement of the INS investigators at factory exits, that the degree of intrusion was so limited that no Fourth Amendment violation existed.

The American Jewish Committee and the Mexican American Legal Defense and Educational Fund were granted leave to file an amicus curiae brief. The amici concentrate on alleged Fifth Amendment equal protection violations stemming from the surveys. The record contains no reference to district court action on the Fifth Amendment issues raised.<sup>7</sup>

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<sup>7</sup> Although the Fifth Amendment claim is mentioned in the First Amended Complaint in CV 78-0740-LEW (PX) (ER at 93), and in the Complaint in CV-78-324-LEW (PX), and is addressed briefly in Plaintiffs' Motion for Summary Judgment filed 1/18/80 (ER 655-57) (only three pages), the district court never addressed the Fifth Amendment issue in any of its orders, find-

## II. STANDARD OF REVIEW

This case appeared before the district court on two sets of cross-motions for summary judgment. In granting the motions in favor of the INS, the district court also adopted, with some changes, the prepared findings of fact and conclusions of law as submitted to the court by the INS. The most significant of the findings and conclusions were the district court's determinations that the plaintiffs did not have a legitimate privacy interest in the factory premises in order to contest the issuance of the search warrants, that none of the named plaintiffs had been arrested, detained or seized, and that the placing of INS agents at the exits of the factory during the operation did not rise to a level implicating Fourth Amendment constraints upon INS conduct.

Our review of summary judgment findings is *de novo*. This court will affirm a grant of summary judgment only if it appears from the record, after viewing all evidence and factual inferences in the light most favorable to the appellant, that there are no genuine issues of material fact and that the appellee is entitled to prevail as a matter of law. *Gaines v. Haughton*, 645 F.2d 761, 769 (9th Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 1006, 71 L.Ed.2d 297 (1982); *Heiniger v. City of Phoenix*, 625 F.2d 842, 843 (9th Cir. 1980). The appellants and appellees agree that none of the material facts are in dispute. The district court acknowledged this as well. Finding of Fact No. 5, filed February 15, 1980, and Finding of Fact IV, filed February 20, 1980. Additionally, we find no evidence in the record that the parties intended a trial on stipulated record which would suggest a clearly erroneous standard

ings or conclusions, and the defendants/appellees never addressed it in their papers below. In view of our disposition, we need not reach these issues.

of review of the district court's findings. See *Starsky v. Williams*, 512 F.2d 109 (9th Cir. 1975). We will, therefore, consider this case to be governed by the standard of review of district court findings applicable to summary judgments, and will review the record with all reasonable evidentiary inferences granted in favor of the appellants.

### III. INS ENTRY WITH SEARCH WARRANT AND CONSENT

The searches at the Davis plant were conducted after the INS had procured search warrants issued by federal magistrates. Appellants assert that the warrants were defective because they were not supported with sufficient probable cause, were lacking in particularity since neither warrant listed the names or identity of particular aliens sought, and that Fed.R.Crim.P. 41 does not authorize the issuance of the type of warrant employed by the INS. We need not reach any of these questions because we are persuaded that the conduct of the INS during the factory surveys violated the Fourth Amendment rights of the factory workers.\*

### IV. FOURTH AMENDMENT CONSIDERATIONS REGARDING DETENTIVE QUESTIONING

#### 1. Execution of the Factory Surveys Constitutes a Seizure Cognizable under the Fourth Amendment.

We now turn to the issues raised by the appellants' challenges to the conduct of the INS upon entry into

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\* In any event, the INS admitted during oral argument that reliance on the warrants was limited to justification for the initial entry into the workplaces. We therefore consider the detentive questioning of the workers to have been warrantless and do not pass judgment upon the propriety of the INS' use of such search warrants. Cf. *Blackie's House of Beef v. Castillo*, 659 F.2d 1211 (D.C.Cir. 1981), cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982).

the factories. A critical threshold issue here concerns the applicability of the Fourth Amendment to the INS questioning of workers during the factory surveys. The Fourth Amendment applies to law enforcement activities involving seizures of the person, including brief detentions short of a traditional arrest. *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981); *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *Reid v. Georgia*, 448 U.S. 438, 440, 100 S.Ct. 2752, 2753, 65 L.Ed.2d 890 (1980); *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975); *Terry v. Ohio*, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877-78, 20 L.Ed.2d 889 (1968).

The INS contends that the facts of this case do not present a detention or seizure which would implicate the objective standards required by the Fourth Amendment, relying primarily upon statements from *Terry v. Ohio*, *supra*; *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979); and *Corodon de Ruano v. INS*, 554 F.2d 944 (9th Cir. 1977). The INS argues that the test for a seizure is one requiring an analysis whether a reasonable, innocent person in the position of plaintiffs would feel free to leave. The INS answers that question, as applied to the facts of the present case, in the negative, contending that the four named plaintiffs circulated throughout the factories and could not reasonably feel detained by the appearance of INS investigators. The INS discounts the stationing of investigators at the exits of the factories by arguing that the plaintiffs complain only of a single encounter with INS investigators, who did not display a weapon or uniform, asking only one to three ques-

tions. These facts, the INS argues, constitute no Fourth Amendment seizure of the plaintiffs.

Appellants argue that the execution of the factory surveys involved a seizure in the nature of custodial detention requiring articulation of probable cause for the arrest of the workers, relying upon *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). In the alternative, the appellants contend that the factory surveys at least rose to the level of a seizure short of a traditional arrest, citing to *Brignoni-Ponce, supra*, and *Terry v. Ohio, supra*. Appellants maintain that the surveys are conducted with an exercise of physical force and a show of authority restraining the liberty of the workers. They point to the procedure whereby the exits to the factories are sealed off, while workers are immediately made aware of this action. They contend that the entry of the large number of agents into the workplace wearing badges and the common observation of immediate arrests of some workers who are seen attempting to flee increases the coercive impact of the operation. Appellants conclude that the plaintiffs are all made aware that for the duration of the survey, they are effectively detained in the custody of the INS agents performing the factory survey.

Initially, we would have to disagree with the appellants that a custodial detention of the sort observed in *Dunaway v. New York, supra*, is presented by the INS factory survey procedure. Although the appellants and other workers are surrounded by investigators placed at exits, and most workers are subjected to at least a visual perusal by investigators, if not actual questioning, the detentive nature of the factory survey, while intrusive, does not rise to the intrusive level of the traditional arrest found in *Dunaway*. *Dunaway* was escorted to police headquarters in a police vehicle and placed in an interrogation room although the officers did not have probable cause for his arrest. The Court



noted that even though Dunaway was not informed that he was under arrest at the time he was originally placed into the custody of the officers, the facts suggested that his detention rose to the level of a traditional arrest requiring the general standard of probable cause that Dunaway had committed the crime under investigation.

The facts of the present case do not suggest an arrest because the record indicates that none of the workers was handcuffed or placed into custody until the investigators had sufficient probable cause to suspect that those in custody were in this country without proper documentation. We therefore find *Dunaway* inapposite.

However, we must agree that the procedure used by the INS involves more than mere questioning or casual conversation as argued by the INS.<sup>9</sup> Our reading of the record in this case leads us to the conclusion that the execution of the factory surveys, while not rising to the level of an arrest requiring the general rule of probable cause, sufficiently intrudes upon the privacy and security interests of the workers that a seizure of the workforce occurs during the surveys.

This court's test to determine whether the factual circumstances of law enforcement activity rise to the level of a seizure under the Fourth Amendment is found in *United States v. Anderson*, 663 F.2d 934 (9th Cir. 1981):

"[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the

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<sup>9</sup> The INS directs our attention to the oft-quoted statement in *Terry v. Ohio*: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." 392 U.S. at 19 n.16, 88 S.Ct. 1868 at 1879, 20 L.Ed.2d 889. The facts of this case suggest that questioning during the factory surveys was other than casual, personal intercourse between workers and INS investigators.

circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

*Id.* at 939, (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, at 1877, 64 L.Ed.2d 497 (1980) (opinion of Stewart, J.)). Although this court in *Anderson* noted that the above-quoted test was stated only in the plurality opinion of Justice Stewart in *Mendenhall* (joined only by Rehnquist, J.), the court proceeded to apply the test to the facts of *Anderson*, holding that a seizure was present in that case. 663 F.2d at 939-40. We will apply the above-quoted test to the facts of this case to determine whether the events taking place during the factory surveys at the Davis and Mr. Pleat factories rose to the level of a Fourth Amendment seizure.

Before applying the test, however, we must recognize that a federal district court has concluded that the "INS's policy of stationing agents at all exits during area control operations, in order to secure the premises and prevent persons whom the agents have probable cause or reasonable suspicion to believe are aliens from leaving the premises during the operation . . . results in 'seizures' for purposes of the fourth amendment." *Illinois Migrant Council v. Pilliod*, 531 F.Supp. 1011, 1018 (N.D.Ill. 1982), granting summary judgment and permanent injunction as to this issue on remand from *Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882 (N.D.Ill.1975), *aff'd*, 540 F.2d 1062 (7th Cir. 1976), *modified as to remedy*, 548 F.2d 715 (7th Cir. 1977) (en



bane).<sup>10</sup> The instant case contains evidence of similar INS policy of stationing agents at the factory exits and entrances for similar purposes. While speaking in general terms about the area control operations performed in the Los Angeles area, the Assistant District Director for Investigations at the Los Angeles office of the INS stated that "[o]fficers are usually stationed at various entrances and exits in order to guarantee that individuals will not escape." Affidavit of Philip Smith, at 3, attached as Exhibit B to Defendant's Memorandum in Support of Defendants' Motion to Dismiss, C.R. 14.

In *Pilliod*, the district court concluded that the "record reveals that the agents do in fact surround and detain all persons on the premises during control operations." 531 F.Supp. at 1018. That court also noted:

"The entire purpose of the policy of 'securing the premises' is to ensure that the agents 'control' the aliens during the course of the 'control operation.' The agents stationed at the exits are specifically instructed to prevent from leaving those individuals they suspect are aliens. The record reveals that the agents do in fact surround and detain all persons on the premises during control operations."

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<sup>10</sup> The district court also denied both parties' motions for summary judgment and sent to trial the issue of whether the INS policy of stopping and questioning during street encounters amounts to a seizure. The court granted the INS' motion for summary judgment on the issue of whether the INS should be enjoined from the use of "dragnet" search warrants since the INS had informed the court that the agency had abandoned its policy of obtaining such warrants. Finally, the district court refused to modify the preliminary injunction at the request of the INS in order to allow the INS to use civil administrative warrants based upon the D.C. Circuit's ruling in *Blackie's House of Beef v. Castillo*, 659 F.2d 1211 (D.C.Cir. 1981), cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982), stating that "[w]arrants to search premises simply do not authorize the seizure of persons found on the premises." *Pilliod*, 531 F.Supp. at 1020. See also, *id.*, at n.19.

*Id.* In response to INS arguments that the workers subjected to the area control operations voluntarily cooperated with the INS questioning and that the workers were never made aware of any limitation upon their movement by the presence of the agents stationed at the exits, the court in *Pilliod* remarked:

"Indeed, the entire notion of preventing people from leaving a given area, and 'securing' that area, requires that the agents rely on their authority, if not actual threats of force, to restrict freedom of movement and the 'freedom to walk away.'"

"[T]he entire notion of 'securing the premises' necessarily implies that those on the premises are made aware of the presence of INS agents."

"Indeed when agents are stationed at points of egress, it is only reasonable to infer that they are there in order to restrict egress. . . . This limitation on the freedom to walk away means that a seizure has occurred for purposes of the fourth amendment."

531 F.Supp. at 1019 (citations omitted).

We think the reasoning of the *Pilliod* court is persuasive.<sup>11</sup> The facts suggesting a seizure of the workforce in this case mirror the facts involved in the factory sur-

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<sup>11</sup> The stationing of INS agents at factory exits was also present in the search of the H & H factory in *Babula v. INS*, 665 F.2d 293, 294 (3d Cir. 1981). However, the Third Circuit did not reach the question of whether the agents' presence at the exits in that case rose to a seizure implicating the Fourth Amendment, quite possibly since the court in that case had already determined in *Lee v. INS*, 590 F.2d 497 (3d Cir. 1979), that any questioning of workers pursuant to 8 U.S.C. § 1357(a)(1) is "limited by the restrictions of the fourth amendment." 665 F.2d at 295. The court in *Babula* held that the questioning of all of the factory workers at the H & H facility was justified by the "suspicions on the milieu in which the workers were found." 665 F.2d at 296.

veys that were the subject of the injunction in *Pilliod*. From the record in this case, we additionally observe that it appears that the stationing of the agents at exits and entrances is an integral feature of the successfully executed factory survey. The surrounding and securing of exits, the obvious function of which is to produce a captive workforce, in combination with the element of surprise, directly leads to many of the desired apprehensions. The total number of apprehensions would doubtless be reduced if the INS did not surround the facility surveyed in order to apprehend those attempting to flee. This flight of workers at a factory survey is a common occurrence as observed by INS investigators, as well as the appellants. We find unpersuasive the INS argument here that detention does not result from the execution of factory surveys where the use of detentive techniques significantly contributes to the apprehensions sought.

Nevertheless, the INS relies upon *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), for the proposition that the detention, if any, that existed during the surveys did not rise to the level of a seizure contemplated by the Fourth Amendment. In *Mendenhall*, Justice Stewart, joined only by Justice Rehnquist, held that the stop and questioning by Drug Enforcement Agency (DEA) agents of Mendenhall in the public concourse of the Detroit Metropolitan Airport did not amount to a seizure of Mendenhall's person, implicating the Fourth Amendment. We fail to find *Mendenhall* dispositive of the seizure issue in this case.

First, as admitted by the INS in its brief, the conclusion that no seizure occurred in *Mendenhall* was shared only by two justices. Three other justices (Powell, Chief Justice Burger, and Blackmun) did not reach the seizure issue since it had not been raised in the courts below, but concurred in the result finding that the DEA

agents had articulable and reasonable grounds for believing that Mendenhall was engaged in criminal activity. Although this court has adopted the test for seizure as enunciated in the Stewart opinion in *Mendenhall*, that test had never been adopted by a majority of the Supreme Court, nor has a majority of the latter court decided whether stopping and questioning of persons matching "drug courier profiles" in airport concourses amounts to a seizure protected by Fourth Amendment standards. *See also Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980).

Second, even if the Court had decided that the minimal intrusions involved in *Mendenhall* and *Reid v. Georgia* did not constitute seizures, we would be compelled to view the detention and questioning of the workforces in the present case as far more intrusive. In *Mendenhall*, Justice Stewart concluded that Mendenhall "was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions." 446 U.S. at 555, 100 S.Ct. at 1878. The Court concluded:

"[N]othing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure."

446 U.S. at 555, 100 S.Ct. at 1878. When comparing *Mendenhall* to this case, we note that, in addition to being questioned as to their citizenship status, the workers at the factory in the present case were subjected to a procedure that included the intrusive aspects noted throughout this opinion; i.e., the threatening presence of a number of INS investigators, some stationed at exits, others carrying out the survey by proceeding methodically down the rows of workers.

The detentive environment created in the surveyed factories in this case is quite different from the casual stopping and questioning involved in *Mendenhall, Reid v. Georgia*, and our recent decision in *United States v. Beale*, 674 F.2d 1327, 1329-30 op. at 1671, 1673-74 (9th Cir. 1982).

Nor do we find *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979), and *Cordon de Ruano v. INS*, 554 F.2d 944 (9th Cir. 1977), helpful to the INS' position that no seizure occurred. Those two cases involved no Fourth Amendment violation when illegal aliens were voluntarily questioned in their homes. As is the case with *Mendenhall* and *Reid v. Georgia*, the level of detention and show of authority involved in *Cuevas-Ortega* and *Cordon de Ruano* simply do not match that involved in the present case.

The INS also cites to *Yam Sang Kwai v. INS*, 411 F.2d 683 (D.C.Cir.) cert. denied, 396 U.S. 877, 90 S.Ct. 148, 24 L.Ed.2d 135 (1969), for the proposition that seizures must be personal and not general, the implication being that the stationing of agents at the exits in the present case could only rise to a general detention or seizure not cognizable as a Fourth Amendment seizure of each worker. We disagree.

*Yam Sang Kwai* does not advance the INS' position. *Yam Sang Kwai* involved a petitioner's argument that he was arrested the moment agents surrounded the outside of the restaurant where he was employed. *Yam Sang Kwai* never saw any of these agents until he was personally confronted. The D.C. Circuit rejected such an *ex parte* arrest notion, observing that a seizure must contain some element by which the seized person is made aware that personal liberty has been restrained. 411 F.2d at 686. The petitioner in *Yam Sang Kwai* was not aware of the agents' actions outside the restaurant and was arrested only after being personally confronted by an investigator who subsequently discovered proba-

ble cause for Yam Sang Kwai's arrest. In the present case, by contrast, the appellants noticed the presence of the INS at the factories immediately as the survey began. The appellants indicated that they were aware that the agents stationed at the exits physically prevented many workers from leaving. In addition, the number of INS investigators, wearing badges and carrying handcuffs, gave the workers the impression that they were tacitly under the detentive powers of the INS for the duration of the survey. Whatever lack of awareness Yam Sang Kwai had is not present on the record before us. Viewing the record with all inferences drawn in favor of the appellants, as is our obligation under our standard of review, we must conclude that the workers at the plants surveyed in this case were aware immediately of the detentive nature of the survey prior to any personal confrontation or interrogation.

Directly addressing the test for Fourth Amendment seizure as stated in *Anderson, supra*, the record indicates that regardless of the fact that some of the four named appellants had varying degrees of freedom to circulate through or exit the factories, the number of INS investigators employed during the surveys and the method of survey execution represented a threatening presence of INS agents to the reasonable worker. The investigators' authority was announced verbally and the display of INS badges worn by the investigators served as a continual reminder of that authority. Agents stationed at exits indicated to the entire workforce that departures were not to be contemplated. Some agents carried handcuffs and used them to detain those apparently suspected of being in this country illegally. The operation unfolded with surprise and resulted in sustained disruption of the working environment. The element of surprise was used to prevent undetected departures, and the methodical execution of the operation with a line of agents proceeding down the



rows of workers could reasonably be viewed as a threatening presence. Under these circumstances, we must conclude that even before individual questioning began, a reasonable worker "would have believed that he was not free to leave." *Anderson, supra*, 663 F.2d at 939. We therefore hold that the manner in which the factory surveys were conducted in this case constituted a seizure of the workforce implicating the Fourth Amendment.

2. The Fourth Amendment Prohibits Detentive Questioning of a Workforce Unless INS Investigators Can Articulate Objective Facts and Rational Inferences From Those Facts That Warrant a Reasonable Suspicion That Each Questioned Person is an Alien Illegally in this Country.

Having determined that a seizure of the workforce occurs during the factory surveys, our next task is to determine the constitutional standard applicable to the INS conduct.

The INS argues that even if a seizure implicating the Fourth Amendment is found, that the intrusion upon the privacy and security interests of the appellants was so slight as to constitute no Fourth Amendment violation, relying upon *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).<sup>12</sup>

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<sup>12</sup> The INS position, in the event we find, as we do, that *Martinez-Fuerte* is inapplicable, apparently is a concession that the Fourth Amendment requires agents to articulate a reasonable suspicion of illegal alienage for detentive questioning. The INS provided the district court with excerpts from the INS Handbook "M-69" entitled "The Law of Search and Seizure for the Immigration Officer," published by the United States Department of Justice, Immigration and Naturalization Service. The Handbook states:

"To stop and question a person encountered in establishments such as restaurants, factories, or hospitals, or beyond 25 miles from any external boundary of the United

The appellants, however, maintain that *Dunaway, supra*, requires the INS to question only those it may have probable cause to arrest during the factory surveys and, in the alternative, for the application of a standard comparable to that applied to automobile stops in *Brignoni-Ponce*. The appellants argue that an element of illegality and an element of individualized suspicion are required for sufficient protection of the Fourth Amendment rights of the workers. We agree with the appellants.

In other factual contexts, the Supreme Court has held that for an investigatory seizure or brief detention to be justified, law enforcement officials must be able to point to articulable and objective facts that the particular person being stopped or detained is suspected of criminal activity. *United States v. Cortez*, 449 U.S. at 417, 101 S.Ct. at 695, and cases cited therein. The above standard is an application of the "ultimate

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States, regarding his right to enter or remain in the United States, an officer must have a reasonable suspicion based on specific articulable facts and rational inferences drawn from those facts that the person is an alien. *However, to detain such a person, the officer must have a reasonable suspicion that he is an alien illegally in the United States.*"

Memorandum in Support of Defendants' Motion for Summary Judgment, Exhibit H, at 64, C.R. 112 (Footnotes omitted, emphasis added). "Detention not amounting to arrest" is defined as "Temporary forcible restraint, usually for the purpose of conducting further investigation." *Id.* at 61. A reasonable suspicion that a person is an alien illegally in this country:

"may be based on such factors as the officer's knowledge of a high concentration of illegal aliens in the area or of recent illegal border crossings, a specific tip from a reliable informant, the subject's excessive-nervousness or studied nonchalance upon being in the presence of or questioned by an immigration officer, or the subject's admissions."

*Id.* at 60-61.

Whether the suggested factors sufficiently meet the constitutional standard is another question which we take up in section IV.3 of this opinion.



standard of reasonableness embodied in the Fourth Amendment," *Michigan v. Summers*, 452 U.S. at 699-700, 101 S.Ct. at 2592-93, and, with the exception of *United States v. Martinez-Fuerte*, requires law enforcement officials to have a reasonable, individualized suspicion that the particular person being detained is engaged in wrongdoing. *United States v. Cortez*.

This appeal presents two difficult issues regarding the constitutional standard applicable to INS citizenship status questioning during factory surveys. The first issue is created by an open question noted by the Supreme Court; i.e., whether citizenship status questioning is constitutionally valid when based upon a suspicion of alienage alone. The second issue is a question whether less than an individualized suspicion is sufficient for questioning workers present in a factory known to employ illegal aliens. We decide the first question by holding that a suspicion of alienage alone is insufficient. We answer the second by noting that case law in other contexts requires an individualized suspicion to justify investigatory seizures and detentions and should also be required in the context of the INS factory survey.

- a. The Fourth Amendment Requires a Reasonable Suspicion That Those Detained and Questioned are in this Country Illegally.

In *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), the Supreme Court announced the Fourth Amendment standard applicable to non-border vehicular stops:

"Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be *illegally in the country*."

422 U.S. at 884, 95 S.Ct. at 2582 (emphasis added).

As for non-vehicular stops and questioning, the Court noted:

"[W]e reserve the question whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. See *Cheung Tin Wong v. INS*, 152 U.S.App.D.C. 66, 468 F.2d 1123 (1972); *Au Yi Lau v. INS*, 144 U.S.App.D.C. 147, 445 F.2d 217, *cert. denied*, 404 U.S. 864, 92 S.Ct. 64, 30 L.Ed.2d 108 (1971). The facts of this case do not require a decision on the point."

422 U.S. at 884 n.9, 95 S.Ct. at 2582 n.9. The stopping<sup>13</sup> and questioning of persons as opposed to the stopping of vehicles is, of course, the question directly presented in the instant case.

Since *Brignoni-Ponce*, various courts of appeal have struggled with the answer to the question reserved in footnote 9 quoted above. The D.C. Circuit cases cited by the Court in footnote 9 of *Brignoni-Ponce* have established the benchmark standards from which the rules in other circuits seem to have evolved. The D.C. Circuit has consistently adhered to the rule that an INS agent, pursuant to statutory authority under section 287(a)(1) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1357(a)(1),<sup>14</sup> may question a person as to his right to be or remain in the United States without forcible detention as long as the agent has a reasonable belief that the questioned person is an alien; *Yam Sang*

<sup>13</sup> We will assume that the statement referring to "stopping" applies to the facts indicating a detention in this case.

<sup>14</sup> Section 287(a)(1) of the Act, 8 U.S.C. § 1357(a)(1) provides: "Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have the power without warrant—

"(1) To interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; ..."

*Kwai v. INS, supra*, and *Blackie's House of Beef v. Castillo*, 659 F.2d 1211, 1226 (D.C.Cir.1981), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982); but agents may forcibly detain a person temporarily for questioning "under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country." *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C.Cir.1971), *cert. denied*, 404 U.S. 864, 92 S.Ct. 64, 30 L.Ed.2d 108 (1971). *See also*, *Ojeda-Vinales v. INS*, 523 F.2d 286 (2d Cir. 1975). This dual standard thus imposes both a constitutional limitation and a statutory limitation upon the conduct of INS agents. If the nature of the agent's conduct employed during the questioning of a suspected alien amounts to a seizure implicating the Fourth Amendment, an INS agent must articulate a reasonable suspicion that the questioned person is an alien illegally in this country. If no seizure is employed, the agent need not articulate reasons to suspect the illegal presence of the person questioned, only a reasonable belief in the questioned person's alienage, the authority granted the INS agent by section 1357(a)(1). Until recently, both standards have been interpreted to require a particularized or individualized suspicion or belief regarding each questioned person in order to justify the intrusion resulting from the questioning.<sup>15</sup>

The *Au Yi Lau* and *Yam Sang Kwai* shifting standards based upon the degree of detention involved during INS citizenship status questioning appear to be the standards presently employed in the Seventh Circuit, *Illinois Migrant Council v. Pilliod*, 548 F.2d 715

<sup>15</sup> *See Babula v. INS*, 665 F.2d 293, 295 (3d Cir. 1981) (less than an individualized suspicion, but one based upon the "suspensions on the milieu in which the [questioned] workers were found," is sufficient to justify questioning under 8 U.S.C. § 1357(a)(1)).

(7th Cir. 1977) (en banc). However, such shifting standards, when applied to street encounters, were rejected forcefully in *Marquez v. Kiley*, 436 F.Supp. 100, 113-114 (S.D.N.Y., 1977).<sup>16</sup> The dual standard was also modified in *Lee v. INS*, 590 F.2d 497 (3d Cir. 1979), where the Third Circuit criticized the fine line drawing required to distinguish detentive from nondetentive questioning, and adopted a standard which combines the detention inquiry with the justification inquiry. The standard currently employed in the Third Circuit asks whether the INS stopping and questioning was reasonably related in scope to the justification for its initia-

<sup>16</sup> In *Marquez*, the district court observed:

"[W]hatever theoretical appeal there may be to a rule which permits casual, voluntary questions upon suspicion of alienage alone, but requires suspicion of illegality for detention, is in our view substantially undermined by the realities of the matter. It is in the nature of an oxymoron to speak of 'casual' inquiry between a government official, armed with a badge and a gun and charged with enforcing the nation's immigration laws, and a person suspected of alienage. This is particularly so in the context of area control operations as described at trial. In such situations a suspect alien is suddenly confronted by INS officers who have just driven up in an automobile, left the car and directly approached, and immediately queried as to his nationality. For a constitutional rule in these matters to depend on the 'voluntary cooperation' of the suspect is to impose a gloss upon real life. When it is further considered that refusal to cooperate or an attempt to evade such a 'casual encounter,' indeed, even the appearance of nervousness, may well be held to provide reasonable grounds to suspect unlawful presence and therefore to authorize forcible detention, see, e.g., *Au Yi Lau v. INS*, *supra*, 445 F.2d at 220; cf. *United States v. Oates*, 560 F.2d at 45 (2d Cir. 1977) (and cases cited there), the rule urged upon us by the government appears unworkable. Although application of the Fourth Amendment requires courts at times to develop artificial constructs which can never precisely conform to the fluid and infinitely various nature of contacts between government officers and the populace, in formulating such rules a court should not ignore the realities of everyday life."

tion. *Id.* at 502; see also *Babula v. INS*, 665 F.2d 293, 295 (3d Cir. 1981) (applying the *Lee* standard, but allowing less than an individualized suspicion to be sufficient for citizenship status questioning).<sup>17</sup>

The Ninth Circuit standard is more in doubt. In *Cordon de Ruano v. INS*, 554 F.2d 944 (9th Cir. 1977), this court rejected an alien's argument that her Guatemalen passport, voluntarily given to INS agents during non-detentive questioning of her, should have been suppressed at her deportation hearing. This court noted that the passport was not illegally seized because the petitioner, Cordon de Ruano, was not "stopped" or "detained," and quoted dicta from *United States v. Brignoni-Ponce*, *supra*, as the established rule that "the INS may not stop or detain persons to question them about their citizenship 'on less than a reasonable suspicion that they may be aliens.'" 554 F.2d at 946, quoting *Brignoni-Ponce*, 422 U.S. at 884, 95 S.Ct. at 2582, 45 L.Ed.2d at 618. Conspicuously absent from the quoted rule is any requirement that the INS agents suspect that the questioned person is in this country illegally. That the quoted rule is dicta is made apparent by footnote 9 in *Brignoni-Ponce*, where the Court reserved the question "whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country." *Id.* Since *Cordon de Ruano* did not require an elicitation of the suspicion standard for stopping and questioning persons since the court found no stop or detention, the case should be read only in aid of determining when a stop and/or detention has occurred which would invoke the appropriate constitutional standard.

A year after the decision in *Cordon de Ruano*, this court found evidence sufficient for the creation of

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<sup>17</sup> See discussion of *Babula* at section IV.2.b. of this opinion.

"founded suspicion to detain" suspected aliens under section 1357(a), citing the D.C. Circuit cases of *Au Yi Lau, supra*, and *Yam Sang Kwai, supra*. *Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1245, 59 L.Ed.2d 472 (1979). The court in *Cabral-Avila*, assuming, without deciding, that probable cause was necessary prior to arrest of the petitioners in that case, held that the "founded suspicion that these persons were *illegal* aliens ripened into probable cause...." *Id.* at 959 (emphasis supplied). *Cabral-Avila* can be read consistently with *Au Yi Lau* to require a suspicion of *illegal* alienage before detention is permitted.

Following *Cabral-Avila*, this court was again called upon to decide whether the non-detentive questioning of an illegal alien at the threshold of her apartment, where she freely admitted her illegal alienage, was violative of the Fourth Amendment. *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979). As in *Cordon de Ruano*, the court found no seizure or detention implicating the Fourth Amendment. In a footnote, the *Cuevas-Ortega* court explained that in a situation in which a seizure is involved, "a non-border stop or detention to question a suspected illegal alien about his citizenship requires "reasonable suspicion." *Id.*, 588 F.2d at 1277. The latter expression of the standard required for stopping and questioning can also be construed to require a reasonable suspicion of *illegal* alienage because of the immediate reference to *Brignoni-Ponce* in the footnote and because the language expressing the standard mentions illegal alienage.

More recently, this court affirmed a district court order suppressing a document which was the basis for an indictment under 18 U.S.C. § 1426(b) for use of forged immigration documents, because the document was elicited from the defendant under circumstances in



which the INS agents failed to articulate "sufficient independent grounds to suspect [the defendant] of being an *illegal alien*." *United States v. Heredia-Castillo*, 616 F.2d 1147-49 (9th Cir. 1980) (Merrill, J., dissenting) (emphasis supplied). the court concluded that the agents had sufficient justification for stopping the vehicle under *Brignoni-Ponce*, but the majority decided that after the agents had discovered the driver of the vehicle to possess proper papers, the agents had insufficient justification for questioning the passenger, Heredia-Castillo. After discounting most of the government's proffered justifications for questioning Heredia-Castillo, the court noted that only two factors were supported by the record: that Heredia-Castillo was found in an area in which illegal aliens were frequently found, and that he appeared to be of Mexican ancestry. Those two observations were insufficient to justify the questioning of Heredia-Castillo. Discussing the latter factor, this court noted:

"The government has enumerated several facts which might cast a certain suspicion on every person in the area who appeared to be of Mexican ancestry. Under the record before us, such a generalized suspicion is not sufficient for us to overturn the trial court's ruling."

616 F.2d at 1150.

*Heredia-Castillo* is significant for a number of reasons. First, since the court held that the vehicle was properly stopped based upon the agents' reasonable suspicion that the driver might be an illegal alien (emphasizing the factor that one of the agents recognized the driver as a man he had previously been arrested for being illegally in the country), the court was not willing to transfer this justification for the additional detention and questioning of the vehicle's passenger when the driver was found to be in the country legally. For this, the court required sufficient independent

grounds to suspect Heredia-Castillo of being an illegal alien—an individualized suspicion. Since Heredia-Castillo was already physically stopped when the INS agents focused their questions upon him, the court then applied the standard of founded suspicion to suspect illegal alienage to justify continued detention and questioning. For this, the agents were not allowed to focus merely upon Heredia-Castillo's apparent Mexican ancestry and the fact that he was present in an area known to contain illegal aliens—such a generalized suspicion is insufficient for further detention and questioning.

Finally, this court interpreted section 1357(a)(1) in *Tejeda-Mata v. INS*, 626 F.2d 721 (9th Cir. 1980), in a way that suggests that section 1357(a)(1) must be interpreted consistently with the Fourth Amendment if a seizure is involved. The court in *Tejeda-Mata* recited the language of section 1357(a)(1) and cites to *Ojeda-Vinales*, *supra* *Cheung Tin Wong*, *supra*, and *Au Yi Lau*, *supra*. As discussed above, those cases all require an agent to articulate a reasonable suspicion of *illegal* alienage before detentive questioning can occur. In *Tejeda-Mata*, the court refused to suppress the alien's admission of alienage, noting that the petitioner was not arrested or threatened with curtailment of his liberty, citing *Cordon de Ruano*, *supra*.<sup>18</sup>

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<sup>18</sup> Having concluded that no seizure was involved in *Tejeda-Mata*, the court went on to explain the reasonableness under section 1357(a)(1) of the Immigration Officer's belief as to *Tejeda-Mata's* alienage justifying the interrogation that took place in that case. The court's discussion as to the statutory standard in *Tejeda-Mata* could be regarded simply as dicta or it could be seen as this court's acknowledgment that immigration officials, in the absence of a constitutional violation, must meet the statutory standard requiring a reasonable belief in the questioned person's alienage. Since the facts in this case do not require a decision regarding the statutory standard, we decline to clarify the discussion of section 1357(a)(1) in *Tejeda-Mata*.



Our reading of the case law in this circuit regarding detentive questioning by the INS as discussed immediately above requires us to hold that INS investigators may not seize or detain workers for citizenship status questioning unless the investigators are able to articulate objective facts providing investigators with a reasonable suspicion that each questioned person, so detained, is an alien illegally in this country.

The element of illegality contained in the standard has been suggested by recent Court pronouncements of Fourth Amendment standards applicable to brief detentions short of formal arrests. In *Michigan v. Summers*, the Court discussed its precedent permitting minimal intrusions and stated:

"These cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity."

452 U.S. at 699, 101 S.Ct. at 2592 (emphasis added). In *United States v. Cortez*, *supra*, the Court stated that "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." 449 U.S. at 417-18, 101 S.Ct. at 694-95.<sup>19</sup>

The element of illegality contained in the standard is also required in order to minimize the effects of en-

<sup>19</sup> See also *Brown v. Texas*:

"[E]ven assuming that [prevention of crime] is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it."

*Id.* 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979).

forcement procedures felt by innocent workers. Our focus is not limited to a discussion of the rights of aliens. As the Court noted in *Brignoni-Ponce*:

"Although we may assume for purposes of this case that the broad congressional power over immigration, . . . authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in this country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens."

422 U.S. at 883-84 (citations omitted). The status of alienage does not imply that any particular aliens is in this country illegally. An alien, as either an immigrant or non-immigrant, may be in this country in total compliance with the immigration laws. Reliance upon section 1357(a)(1) therefore is insufficient. Although the statute is silent as to any requirement of suspicion of illegal presence, to assert that section 1357(a)(1) justifies the detentive questioning of an entire workforce simply ignores the truism that innocent citizens and aliens legally employed at surveyed factories enjoy the same right to be free of the indignity of arbitrary government intrusions which the Fourth Amendment guarantees all individuals. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S.Ct. 1391, 1395-96, 59 L.Ed.2d 660 (1979).

We realize that our holding here limits section 1357(a)(1) questioning in the context of factory surveys of the nature presented by the facts of this case. But this is not the first time the statute has been so limited. The Court has held that section 1357(a)(1) cannot justify a constitutional violation, *Brignoni-Ponce*, *supra*; and we are mindful of the Court's more general admonition that "no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). In view of the above, and the par-

ticular facts involved in this case, we think that a standard allowing detentive questioning on a suspicion of alienage alone would diminish the privacy and security interests of both citizens and aliens legally in this country. Random detentive questioning of all who may appear to be aliens without objective facts giving rise to a suspicion of illegal alienage would grant the INS impermissible discretion to detain and question at whim. See *Delaware v. Prouse*, *supra*.

b. The Fourth Amendment Requires an Individualized Suspicion of Illegal Alienage of Those Subject to Detentive Questioning.

As with the illegality requirement of the standard, detentive questioning, if not based upon an individualized, articulable suspicion, would be impermissibly random. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Heredia-Castillo*, *supra*.

The INS contends that individualized suspicion is not required. The INS relies upon *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), arguing that even if a seizure were present during the factory surveys, that it was minimal; and, consequently, the government's interest in apprehending illegal aliens outweighs any interest of the questioned workers to be free from this minimal intrusion. In *Martinez-Fuerte*, the Supreme Court sanctioned the practice of the Border Patrol at permanent checkpoints to refer some vehicles to a secondary inspection area for additional questioning of citizenship status of the passengers of the vehicle on less than a particularized or individualized suspicion as to each person subjected to the referral, noting that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *Id.*, 428 U.S. at 543, 96 S.Ct. at 3074. The requirement of individualized suspicion was not imposed in *Martinez-Fuerte* because the re-

sulting intrusion of the permanent checkpoint stops on the interests of the motorists was minimal and outweighed by the substantial law enforcement interests involved. The INS argues that the intrusion, if any, in the instant case, is less than that permitted in *Martinez-Fuerte*, and that the same governmental interest in enforcement of the immigration laws makes it permissible for the INS to question factory workers on less than an individualized suspicion.

The appellants, on the other hand, find *Martinez-Fuerte* inapplicable. The appellants emphasize the Court's limited holding in *Martinez-Fuerte* to permanent checkpoints because motorists at these checkpoints are not taken by surprise and that the routine operation of the checkpoints involves little discretionary law enforcement. 428 U.S. at 559, 96 S.Ct. at 3083. The appellants argue that the facts of the instant case are more like a roving border patrol stop than a permanent checkpoint, contending that the individualized suspicion standard imposed in *Brignoni-Ponce* should apply here. We must agree with appellants.

Although we recognize the weighty law enforcement interests involved,<sup>20</sup> the language in *Martinez-Fuerte* is more supportive of the appellants' position than that of the INS. In discussing the differences between a permanent checkpoint stop and a roving patrol stop in *Martinez-Fuerte*, the Court noted that while the objective intrusion (the stop itself, the questioning and visual inspection) was similar in both cases, the subjective intrusion (concern or fright on the part of lawful travelers) in a roving stop was much greater. The Court noted that when compared with a roving patrol stop, the permanent checkpoint stop was much less intrusive because motorists were not taken by surprise and that

<sup>20</sup> See, e.g., the discussion of the law enforcement problem involved in *Martinez-Fuerte*, *supra*, 428 U.S. at 551-53, 96 S.Ct. at 3080.

checkpoint operations "both appear to and actually involve less discretionary enforcement activity." 428 U.S. at 559, 96 S.Ct. at 3083. Commenting on the procedure of selective referral at the checkpoints, the Court stated:

"Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature."

428 U.S. at 560, 96 S.Ct. at 3084. In comparison to that statement, the record in the instant case contains evidence that the factory surveys were quite frightening to the workers, leaving many in a state of anxiety over perceived recurrence of the surveys and subsequent arrests. Instead of the three or four minute routine detention of lawful motorists at the permanent checkpoint in *Martinez-Fuerte*, the record in this case indicates a relatively greater degree of disruption from the surprise entry of the workplace for the typical hour and one-half of questioning and for some time thereafter. Moreover, the actual implementation of the factory surveys in the instant case suggests more random enforcement, giving agents greater discretion than is involved in the checkpoint operation. By securing exits and systematically proceeding in a line down rows of workers, the INS factory survey compares more to an unannounced automobile checkpoint located and operated by surprise wherein all motorists are detained for an hour and one-half, while the agents systematically scrutinize all detained motorists and passengers, choosing those the agents wish to question. The factors involved in a permanent checkpoint on highways that balance against impermissible discretionary law enforcement, i.e., no surprise, short duration, minimal disruption, are simply not present in the instant case. The factory survey in which an entire workforce is detained and subjected to INS scrutiny, a survey requir-

ing the element of surprise in order to be successful, is an operation presenting serious dangers to the Fourth Amendment rights of citizens and legal alien workers. Such a survey cannot be considered to be as minimally intrusive as a permanent checkpoint stop. We therefore reject the notion that *Martinez-Fuerte* allows factory survey questioning of individual workers on less than a particularized or individualized suspicion of each worker questioned.

By rejecting the *Martinez-Fuerte* analogy, we necessarily reject *Babula v. INS*, 665 F.2d 293 (3d Cir. 1981), to the extent that case stands for the proposition that factory survey questioning is constitutionally permissible on less than a particularized suspicion. In *Babula*, the INS had received information from a reliable source that H & H Industries at Pennsauken, New Jersey, had employed illegal aliens. The information listed seven named Polish aliens and the source informed the INS that the company had employed additional unnamed illegal aliens. INS records suggested that six of the seven named persons were not subject to deportation. After deciding that the H & H Factory would be a feasible location for an "area control operation," the INS agents carried it out by using six agents, three posted at the exits of the factory "to prevent anyone from leaving the factory," and three entered the factory. Upon entry, the agents spoke with the general manager and the night foreman, inquiring about the seventh named, suspected illegal alien, and were informed that this person no longer worked at the factory. Thus, with no information as to any particular named persons who were suspected of being in the country illegally, the agents began questioning workers in the factory as to their citizenship status and whether they had the proper papers. Ten workers were arrested. All petitioners in the *Babula* case were found deportable by an immigration judge, the deportation

orders subsequently being affirmed by the Board of Immigration Appeals.

One of the issues raised by the petitioners in *Babula* was whether the agents had violated their Fourth Amendment rights by questioning them at the factory pursuant to 8 U.S.C. § 1357(a)(1). The Third Circuit had held previously that section 1357 was limited by the restrictions of the Fourth Amendment. *Lee v. INS*, 590 F.2d 497, 499-500 (3d Cir. 1979). Reaching the merits of the Fourth Amendment contention, the Third Circuit in *Babula* noted:

"[I]n this case the agents had observed nothing specifically about each person questioned, but rather based their suspicions on the milieu in which the workers were found. We hold that the tip from a reliable source about the employment of illegal Polish aliens, combined with the indicia that H & H did employ Polish aliens, are sufficient to justify the minimally intrusive questioning that the agents conducted."

665 F.2d at 296. The court proceeded to justify its "milieu" standard by indicting that "individualized suspicion is not required . . . when 'we deal neither with searches nor with the sanctity of private dwellings.'" *Id.* The court also emphasized that the INS agents were not allowed unfettered discretion because "all the employees rather than a selection of them" were questioned at H & H. *Id.* at 296-97.

We have serious problems with the *Babula* reasoning and find it inapposite to the facts of this case. The questioning of workers at the H & H facility on less than an individualized suspicion that each questioned worker was an illegal alien appears to be a departure from the suspicion required in the Third Circuit's own case of *Lee v. INS*, *supra*. Even though *Lee* rejected the dual, constitutional/statutory standard based upon the degree of detention involved that is the standard suggested in *Pilliod*, *Au Yi Lau* and *Yam Sang Kwai*, the



facts of *Lee* required the Third Circuit to determine that the INS agent had sufficient articulable facts concerning Lee individually that the scope of the detention in that case was reasonably related to the justification for its initiation. See dissenting opinion of Adams, J.; 665 F.2d at 300. *Babula* now extends the rule to situations in which the INS can prove the reasonableness of the questioning based upon information that the factory has employed illegal aliens in the past. For this holding, the Third Circuit notes that although " 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search and seizure, [there is] no irreducible requirement of such suspicion . . . . ' " *Babula*, 665 F.2d at 296 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976)).

In addition, the Third Circuit noted that the INS questioned all of the workers at H & H, which the court apparently felt justified the questioning since the questioning of all workers does not involve the INS in the kind of discretionary law enforcement activity that was struck down in *Delaware v. Prouse*, *supra*.<sup>21</sup> It is therefore unclear what the Third Circuit would do were it presented with a case, such as the one presented to us here, where less than all workers were questioned.<sup>22</sup>

Finally, the *Babula* court attempted to harmonize its holdings with that of the Seventh Circuit in *Illinois Mi-*

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<sup>21</sup> "To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . . ' " *Delaware v. Prouse*, 440 U.S. at 661, 99 S.Ct. at 1400 (quoting *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968)).

<sup>22</sup> As for the Davis surveys, the INS admits that it was impossible for them to question every worker out of the workforce of from 200-300 workers. Affidavit of Philip Smith, C.R. 14, at 3.



*grant Council v. Pilliod, supra.* The *Babula* court stated that the holding in *Babula* did not imply any disagreement with *Pilliod* because *Pilliod* involved late night, warrantless searches of living quarters. 665 F.2d at 297. This attempted harmonization is difficult to comprehend. First, the preliminary injunction in *Pilliod* was directed at factory area control operations, as well as searches of dwellings, dormitories and street encounters. See *Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882, 886-891 (N.D.Ill.1975). Second, the factual discussion in *Babula* does not express the degree of detention, if any, that the workers at H & H suffered while being questioned during the area control operation there. All we know is that "three agents remained at the exits to the factory to prevent anyone from leaving the factory." 665 F.2d at 294. If *Babula* and *Pilliod* can be harmonized, it could only be from inferring that the *Babula* court felt that the degree of detention of the workers at H & H was of the non-detentive nature. This still does not entirely agree with the relief granted in *Pilliod*, for even if non-detentive questioning were involved at H & H, our reading of *Pilliod* would still require the INS agents to have a reasonable belief that the particular persons questioned without detention were aliens. On that note, the Third Circuit merely indicates that the agents "had observed nothing specifically about each person questioned, but rather based their suspicions on the milieu in which the workers were found." 665 F.2d at 296. This "milieu" standard is simply inconsistent with the standard adopted by the Seventh Circuit in *Pilliod*, and, in our minds, inconsistent with that required by the Fourth Amendment.

Thus, *Babula* provides this court with little assistance in deciding the issues before us. The *Babula* court relied heavily upon *Martinez-Fuerte*, a case we find inapplicable to the factory surveys that are the basis of the litigation presented in this case. Also, the *Babula*

court noted that the methodical questioning of all of the workers at the H & H facility minimized the random discretion criticized in *Delaware v. Prouse, supra*. The INS admits that each worker was not questioned at the Davis survey in this case; therefore, any justification, if such exists, from the fact that all workers were questioned in *Babula*, does not transfer to this case.

In sum, the intrusive nature of the factory surveys in the present case is comparable to that found in a roving patrol stop discussed in *Brignoni-Ponce*, *Martinez-Fuerte*, and *Babula*, therefore, cannot be accepted as models for an announcement that the factory surveys are not violative of the Fourth Amendment. The detention and questioning of the workers in the surveyed factories must be based upon a reasonable suspicion that each worker subjected to detentive questioning is an alien illegally in this country, and the Fourth Amendment rights of all workers depend upon a standard requiring the INS to articulate an individualized suspicion that a questioned person is in this country illegally.

3. The Record fails to Substantiate the INS Claim That the Fourth Amendment Standard Was Met During the Factory Surveys.

Finally, we must apply the constitutional standard to the facts of this case. The INS argues that there was a sufficient basis for the questioning that occurred at the two factories. Relying on *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), where the Court defined reasonable suspicion to include an assessment of the totality of the circumstances surrounding a seizure in light of a law enforcement officer's experience, the INS points to a number of circumstances attending the factory surveys that justify the type of questioning that occurred. The INS directs our attention to the fact that the two factories surveyed were garment factories, an industry the INS alleges is

known to employ large numbers of illegal aliens; that prior to the Davis surveys, INS investigators had arrested several illegal alien employees outside the factory premises who stated that other illegal aliens were employed in the factory; that upon entry of the INS investigators into the plants, the employees shouted "La Migra" and a large number of employees began running around the factory or hiding; and that by the time of the second Davis survey, the INS investigators knew that they had previously apprehended 78 illegal aliens from the first survey. In addition, the INS once again asserts that it could justifiably question appellants Labonte and Miramontes, resident aliens, under 8 U.S.C. § 1357(a)(1).

None of the above factors alone, or in combination, can justify the detentive questioning in this case because we have held that the factory surveys conducted at the Davis and Mr. Pleat facilities involved a seizure or detention of the entire workforce by the nature in which the surveys were carried out.<sup>23</sup> Since the entire workforce is effectively detained in a manner implicating the Fourth Amendment standard discussed above, the circumstances the INS cites to justify the questioning simply do not aid our analysis of whether the INS had a reasonable, individualized suspicion of illegal alienage of each detained worker prior to the execution of the surveys. Moreover, we think the warrantless detention of the workforces in this case cannot possibly be justified under the standard we find applicable today.

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<sup>23</sup> Assuming a factory survey could be, or would be, performed in a non-detentive atmosphere, it is not appropriate in this case for us to provide the INS with a list of justifying factors for such a hypothetical survey. The constitutionality of questioning during such a non-detentive factory survey would be judged upon the specific facts giving rise to each instance of interrogation.

We feel the Fourth Amendment rights of workers would be impermissibly diminished were we to sanction the unconstrained use of warrantless, detentive questioning of the sort depicted by this record—questioning which is frightening to the workers, intrusive, and often “based on nothing more than inarticulate hunches.” *Terry v. Ohio*, 392 U.S. at 22, 88 S.Ct. at 1880. The suggestions in the INS “M-69” handbook that a reasonable suspicion of illegal alienage may be based on an officer’s knowledge of a high concentration of illegal aliens in the area surveyed, without more, is insufficient. *Heredia-Castillo*, *supra*. The apparent Hispanic ancestry of one sought for questioning, while possibly relevant, see *United States v. Brignoni-Ponce*, 422 U.S. at 886-87, 95 S.Ct. at 2582-83, is insufficient, even if noticed in conjunction with the knowledge of the presence of a person in an area known to contain a high concentration of illegal aliens. *Heredia-Castillo*, *supra*. That a factory happens to be a garment factory, without more, is insufficient grounds for the effective detention of the entire workforce in such a factory. Whether “excessive nervousness” or “studied nonchalance,” of a suspected illegal alien observed prior to detentive questioning, would be sufficient to meet the standard announced in this opinion is basically a factual question to be resolved on a case-by-case basis. The INS makes no claim here that such observations were made of the entire workforces at the surveyed factories.

Certainly, *United States v. Cortez*, *supra*, instructs courts to grant some deference to the field officer’s experience and his or her view of the totality of the circumstances attending any particular detention or apprehension. However, *Cortez* cannot be read to justify the detention of a workforce and questioning of workers on subjective or generalized suspicions that some unidentified workers in a factory may be found to be in

this country without proper documentation. The Court in *Cortez* held:

"Based upon [the] whole picture, the detaining officers must have a *particularized and objective* basis for suspecting the particular person stopped of criminal activity."

449 U.S. at 417-18, 101 S.Ct. at 694-95 (emphasis added). The suspicious facts offered by the INS which provide a general focus upon the factories surveyed, while possibly true, do not provide sufficient justification for the execution of the surveys in a manner which effectively detains an entire workforce. The factors listed by the INS fail to provide a particularized and objective basis prior to the execution of the surveys for suspecting any of the questioned workers of being aliens illegally in this country.

We recognize that our decision today may hinder INS efforts to seek out illegal aliens in workplaces. Acknowledging that fact, we think it also appropriate to acknowledge that this case effectively illustrates the irony noted by Justice White when he commented some years ago on the INS' struggle to contain the heavy flow of illegal aliens into this country:

"The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. *Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country.*"

Concurring opinion of Justice White, joined by Justice Blackmun in *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 914-15, 95 S.Ct. at 2597, and in *United States v. Ortiz*, 422 U.S. 891, 914-15, 95 S.Ct. 2585, 2597, 45 L.Ed.2d 623 (1975) (emphasis added). To find

the factory survey procedures evidenced by the record before us constitutional would be, as suggested by Justice White, straining the Fourth Amendment requirements in order to accommodate an intrusive and objectionable method of immigration law enforcement. The Constitution, as we interpret it, cannot be so accommodating. We therefore reverse the district court's summary judgment in favor of the INS on the issue of worker questioning.<sup>24</sup>

#### V. CONCLUSION

The summary judgment granted in favor of the INS on the issue of worker questioning is reversed. This case is remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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<sup>24</sup> The district court did not abuse its discretion in denying class certification. See *James v. Ball*, 613 F.2d 180, 186 (9th Cir. 1979), and cases cited therein.

Our holdings today also make it unnecessary to reach the issue of whether the district court correctly dismissed the ILGWU. The effects of our holdings will nevertheless inure to the benefit of the ILGWU.

**APPENDIX B**

**THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**INTERNATIONAL LADIES' GARMENT WORKERS' UNION,  
AFL-CIO, ET AL., PLAINTIFFS-APPELLANTS,**

*v.*

**JOSEPH SURECK, ET AL., DEFENDANTS-APPELLEES.**

---

**INTERNATIONAL LADIES' GARMENT WORKERS' UNION,  
AFL-CIO, ET AL., PLAINTIFFS-APPELLANTS,**

*v.*

**JOSEPH SURECK, ET AL., DEFENDANTS-APPELLEES**

**Nos. 80-5054, 80-5153, 80-5035, 80-5152**

**Filed Sep 30, 1982**

**ORDER**

Before: ANDERSON and NORRIS, Circuit Judges, and  
MUECKE,\* District Judge.

The panel as constituted in the above case has voted  
to deny the petition for rehearing and to reject the sug-  
gestion for a rehearing en banc.

The full court has been advised of the suggestion for  
en banc rehearing, and no judge of the court has re-  
quested a vote on the suggestion for rehearing en banc.  
Fed. R. App. P. 35(b).

The petition for rehearing is denied and the sugges-  
tion for a rehearing en banc is rejected.

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\*The Honorable C.A. Muecke, Chief Judge, United States District  
Court, District of Arizona, sitting by designation.



No. 82-1271

Office - Supreme Court, U.S.

FILED

AUG 10 1983

ALEXANDER L. STEVAS

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,  
PETITIONERS

v.

HERMAN DELGADO, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

---

BRIEF FOR THE PETITIONERS

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REX E. LEE

*Solicitor General*

STEPHEN S. TROTT

*Assistant Attorney General*

ANDREW L. FREY

*Deputy Solicitor General*

ELLIOTT SCHULDER

*Assistant to the Solicitor General*

PATTY MERKAMP STEMLER

*Attorney*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

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### **QUESTION PRESENTED**

Whether INS agents violate the Fourth Amendment when, possessing probable cause to believe that a number of employees at a factory are illegal aliens, they conduct a survey of the factory's employees by stationing agents at the factory exits and walking through the factory addressing brief inquiries to individual employees suspected of being aliens regarding their citizenship or resident alien status.

### **PARTIES TO THE PROCEEDING**

Joseph Sureck (now replaced as District Director of INS by Michael Landon), William French Smith, Leonel J. Castillo (now replaced as Commissioner of INS by Alan C. Nelson), Gil Clarin and James Robinson were appellees below in their official capacities and are also petitioners here. Herman Delgado, Ramona Correa, Francis Labonte, and Maria Miramontes were appellants below and are respondents here. The International Ladies' Garment Workers' Union, AFL-CIO (ILGWU) was originally a plaintiff in the district court, but the court ordered it dismissed as a party (Pet. App. 59a-61a). ILGWU appealed from the dismissal order, and thus, while the court of appeals did not rule on that portion of the appeal (Pet. App. 43a n.24), ILGWU is nominally a respondent here.

## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Constitutional provision and statute involved .....	2
Statement .....	2
Summary of argument .....	15
<b>Argument:</b>	
To the extent that factory workers are seized at all in the course of INS surveys, such seizures are reasonable under the Fourth Amendment .....	19
A. The stationing of INS agents at exits during a factory survey does not result in the "seizure" of the entire work force .....	22
B. Even if the stationing of INS agents at factory exits results in a technical "seizure" of the entire work force, that seizure is reasonable under the Fourth Amendment .....	25
C. The Fourth Amendment does not require INS agents to have a reasonable suspicion that each employee questioned as to citizenship status during a factory survey is an illegal alien .....	32
1. The Fourth Amendment permits an INS agent to stop and question a person reasonably suspected of being an alien as to his "right to be or to remain in the United States" .....	34
2. The Fourth Amendment does not require individualized suspicion for the detention of employees for questioning during a factory survey if the detention is supported by a reasonable suspicion that a substantial number of the employees are illegal aliens .....	40
Conclusion .....	44

## IV

## TABLE OF AUTHORITIES

Cases:	Page
<i>Almeida-Sanchez v. United States</i> , 413 U.S. 266....	38
<i>Au Yi Lau v. INS</i> , 445 F.2d 217, cert. denied, 404 U.S. 864 .....	39
<i>Babula v. INS</i> , 665 F.2d 293 .....	42, 43
<i>Camara v. Municipal Court</i> , 387 U.S. 523 .....	42
<i>Dalia v. United States</i> , 441 U.S. 238 .....	30
<i>Delaware v. Prouse</i> , 440 U.S. 648 .....	21, 31, 39
<i>Donovan v. Dewey</i> , 452 U.S. 594 .....	38
<i>Dunaway v. New York</i> , 442 U.S. 200 .....	13, 20
<i>Fiallo v. Bell</i> , 430 U.S. 787 .....	36
<i>Florida v. Royer</i> , No. 80-2146 (Mar. 23, 1983) .....	22, 35
<i>Illinois Migrant Council v. Pilliod</i> , 548 F.2d 715...	39
<i>Illinois Migrant Council v. Pilliod</i> , 531 F. Supp. 1011 .....	12
<i>Kleindienst v. Mandel</i> , 408 U.S. 753 .....	36
<i>Lee v. INS</i> , 590 F.2d 497 .....	37, 39
<i>Marshall v. Barlow's Inc.</i> , 436 U.S. 307 .....	38, 41-42
<i>Michigan v. Summers</i> , 452 U.S. 692 .....	20
<i>Terry v. Ohio</i> , 392 U.S. 1 .....	22, 35
<i>United States v. Anderson</i> , 663 F.2d 934 .....	13
<i>United States v. Biswell</i> , 406 U.S. 311 .....	38
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873 ...	3, 21, 35, 36, 37, 40, 42
<i>United States v. Caceres</i> , 440 U.S. 741 .....	39
<i>United States v. Campos-Serrano</i> , 404 U.S. 293 ...	36
<i>United States v. Martinez</i> , 507 F.2d 58 .....	37
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 ...	<i>passim</i>
<i>United States v. Mendenhall</i> , 446 U.S. 544 .....	22, 35
<i>United States v. Ortiz</i> , 422 U.S. 891 .....	26
<i>United States v. Place</i> , No. 81-1617 (June 20, 1983) .....	21
<i>United States v. Villamonte-Marquez</i> , No. 81-1350 (June 17, 1983) .....	21, 25, 31, 39, 40, 42
<i>Zepeda v. INS</i> , 708 F.2d 355 .....	24

## Constitution and statutes:

## U.S. Const.:

Amend. IV .....	<i>passim</i>
Amend. V (Due Process Clause) .....	10

Constitution and statutes—Continued	Page
8 U.S.C. 1151 .....	2
8 U.S.C. (Supp. V) 1151 .....	3
8 U.S.C. 1302 .....	36
8 U.S.C. 1304 .....	36
8 U.S.C. 1304(a) .....	36
8 U.S.C. 1304(d) .....	36
8 U.S.C. 1304(e) .....	8, 17, 36
8 U.S.C. 1357 .....	38
8 U.S.C. 1357(a) .....	2
8 U.S.C. 1357(a) (1) .....	2, 12, 14, 17, 36, 37, 38

**Miscellaneous:**

J. Passel & R. Warren, <i>Estimates of Illegal Aliens from Mexico Counted on the 1980 United States Census</i> (U.S. Bureau of the Census Apr. 1983) ..	3
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# **In the Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 82-1271

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,  
PETITIONERS

*v.*

HERMAN DELGADO, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## **BRIEF FOR THE PETITIONERS**

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### **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 681 F.2d 624. The opinions of the district court (Pet. App. 45a-60a) are not reported.

### **JURISDICTION**

The judgment of the court of appeals (Pet. App. 61a) was entered on July 15, 1982. A petition for rehearing was denied on September 30, 1982 (Pet. App. 44a). Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 28, 1983. The petition was filed on that date and was granted on April 25, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**CONSTITUTIONAL PROVISION  
AND STATUTE INVOLVED**

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

8 U.S.C. 1357(a) provides in pertinent part:

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States \* \* \*

**STATEMENT**

This case concerns the permissibility under the Fourth Amendment of the Immigration and Naturalization Service's practice of conducting factory surveys for the purpose of locating illegal aliens.

1. As this Court has observed, "[i]t has been national policy for many years to limit immigration into the United States." *United States v. Martinez-Fuerte*, 428 U.S. 543, 551 (1976). Congress has sought to implement this policy by setting an annual immigration quota.<sup>1</sup> It is well documented, however,

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<sup>1</sup> Before 1978, Congress had established separate annual immigration quotas for aliens from the Eastern and Western Hemispheres. See 8 U.S.C. 1151 (annual ceiling of 170,000

that "[m]any more aliens than can be accommodated under the quota want to live and work in the United States. Consequently, large numbers of aliens seek illegally to enter or to remain in the United States." *Ibid.* A recent Census Bureau study reveals that more than 2 million illegal aliens were counted in the 1980 census. J. Passel & R. Warren, *Estimates of Illegal Aliens from Mexico Counted in the 1980 United States Census* 8 (U.S. Bureau of the Census Apr. 1983). Of these, nearly two-thirds were from Latin America, including Mexico. *Id.* at 9. The number of illegal aliens who eluded the latest census is sheer conjecture.<sup>2</sup> But, as this Court has recognized, "[w]hatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-879 (1975).

In the experience of the Immigration and Naturalization Service, high concentrations of illegal aliens are likely to be found in factories that employ large numbers of unskilled or semi-skilled workers. See J.A. 46-47. Accordingly, factory surveys are the most effective means of detecting illegal aliens who have eluded the Border Patrol. In 1977, of approximately 200 illegal aliens apprehended daily in the

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aliens from the Eastern Hemisphere and 120,000 aliens from the Western Hemisphere). In 1978, Congress enacted legislation providing for a single, world-wide quota of 270,000. See 8 U.S.C. (Supp. V) 1151.

<sup>2</sup> In 1979, the Assistant District Director of the INS in Los Angeles estimated that at least a half million illegal aliens resided in the Los Angeles area alone. J.A. 43.



United States in areas away from the border, between 100 and 150 were found during the execution of factory surveys. J.A. 47.<sup>3</sup> In Los Angeles alone during that year, more than 20,000 illegal aliens were arrested in the course of such surveys; on some occasions, a survey of a single factory resulted in the apprehension of more than 100 illegal aliens in a single day. J.A. 43-44, 46.

2. The specific factual context underlying this case consists of three factory surveys conducted by the INS in 1977 at two garment factories located in the Los Angeles area. The record contains affidavits by government officials relating to the manner of conducting these and other factory surveys, together with depositions of the individual respondents and of immigration officers describing the surveys. As the court of appeals found (Pet. App. 8a), the material facts are not seriously in dispute.

a. In January and September 1977, the INS obtained search warrants authorizing its officers to search the business premises of the Southern California Davis Pleating Company (Davis Pleating) for illegal aliens. The warrants did not identify any particular illegal aliens by name. Instead, the warrants, which were based on reliable information showing that Davis Pleating employed illegal aliens, authorized INS agents to search the factory for such persons (Pet. App. 5a & n.5).<sup>4</sup> Pursuant to these war-

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<sup>3</sup> More recently, the INS has estimated that factory surveys accounted in 1982 for approximately 60% of all illegal aliens apprehended by the INS in nonborder locations. This figure was derived by the INS from its own internal records and is consistent with the statement cited in the text.

<sup>4</sup> The affidavit submitted in support of the January warrant stated that INS investigator Gail Richard Kee had con-

rants, INS officers entered Davis Pleating in January 1977 and arrested 78 illegal aliens from among approximately 300 employees present on the premises; in September 1977, the officers arrested 39 illegal aliens out of a work force of approximately 200 employees. Pet. App. 4a; J.A. 51.

In October 1977, INS officers conducted a survey of the work force at Mr. Pleat, another garment factory. This survey also was conducted because the INS had received information establishing that Mr. Pleat employed illegal aliens. On this occasion, however, the INS agents entered the factory with the consent of Mr. Pleat's owner, rather than pursuant to a warrant. This survey resulted in the apprehen-

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ducted surveillance outside the Davis Pleating factory and had stopped three female illegal aliens entering the factory. Each of the three women, who were named in the affidavit, informed Investigator Kee that Davis Pleating employed many illegal aliens of Latin extraction. (This affidavit was attached as Exhibit A to the first amended complaint in No. CV 78-0740-LEW (PX). See J.A. 10.)

The September warrant was issued on information volunteered to the INS by Rachel Mata, an employee at Davis Pleating who was displeased with the company's hiring of illegal aliens. Mata identified by name two illegal aliens who had been deported following the January survey and had returned to the United States and resumed their positions at Davis Pleating. She further stated that many other employees boasted that they had no immigration documents and that if arrested they would return immediately to the United States and resume their jobs. She also reported that Davis Pleating had recently hired about one hundred employees and that most of them appeared to be illegal aliens. Information was also supplied to the INS by an illegal alien who worked at Davis Pleating. She maintained that four of her co-workers were illegal aliens. (The affidavit supporting the September warrant was attached as Exhibit C to the complaint in No. CV 78-3246-WMB (GX).)

sion of 45 illegal aliens out of a work force of approximately 90 employees. Pet. App. 4a; J.A. 51.<sup>5</sup>

The factory surveys at both Davis Pleating and Mr. Pleat were conducted in accordance with standard INS procedures established on a nationwide basis. See generally J.A. 43-45, 46-50, 52-54. A team of plainclothes INS agents wearing INS badges entered the factory to question the employees while other agents stationed themselves at the doors to prevent suspected illegal aliens from escaping.<sup>6</sup> The agents identified themselves and announced their purpose. The agents, who displayed no weapons and

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<sup>5</sup> Ordinarily, when INS officers receive reliable information that a factory is employing illegal aliens, they will contact the owner and seek his consent for a factory survey. In more than 90% of the cases, the owner consents to the survey. If consent is refused, the officers apply for a search warrant authorizing them to enter the factory to conduct a survey. J.A. 44, 47, 52-53.

<sup>6</sup> The court of appeals concluded that agents are positioned at the doors "to prevent persons from leaving the workplace." Pet. App. 4a (footnote omitted). As the record demonstrates (see J.A. 98, 136-137), however, the agents at the exits do not prevent employees from exiting the factory. They are stationed at the exits so that they can observe persons who approach the exits, question as to their citizenship status those persons they believe to be aliens, and detain for further inquiry those persons who they reasonably suspect are aliens illegally in the United States. J.A. 151, 154, 157-158. Although the court of appeals purported to rely for its conclusion on the statement of the INS's Assistant District Director that "[o]fficers are usually stationed at various entrances and exits in order to guarantee that individuals will not escape" (Pet. App. 14a; J.A. 48), this statement clearly is a reference to the need to prevent suspected illegal aliens from taking flight. As the Assistant District Director further explained (J.A. 50), "[i]n instances where a person is found hiding or after attempting to flee from an Immigration officer, such person is detained for questioning based on the premise that he did attempt to hide or abscond."

were instructed to be courteous and cause as little disruption as possible, then walked slowly through the factory, asking between one and three questions of employees who they had reason to believe were aliens.<sup>7</sup> Generally, the first question pertained to place of birth or citizenship status. If the individual replied that he was born in the United States or that he was a citizen, usually no further questions were asked. If the response gave the agent reason to believe that the individual was an alien, the agent would ask the basis for the alien's presence in the United States<sup>8</sup> and would ask to see the alien's im-

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<sup>7</sup> The court of appeals stated (Pet. App. 4a) that INS agents are instructed to question each worker, but the record demonstrates that this statement is erroneous. As a matter of policy, the INS instructs its agents to question as to citizenship status only those persons who they reasonably suspect are aliens. See J.A. 41; but see J.A. 154-155. The record<sup>1</sup>, including the depositions of the respondents, confirms that the agents do not question all employees in this regard. J.A. 44, 48-49, 86, 105-106, 113, 155-156. By the same token, INS agents may ask employees who are not suspected of being aliens whether they know of other employees who are illegal aliens or who have concealed themselves from the agents; in some instances, the agents may respond to questions posed by employees. J.A. 49, 53. Thus, in practice, the agents do speak to most of the employees they encounter, and they do not invariably have a reasonable suspicion of alienage with respect to each person whom they engage in conversation during a factory survey. J.A. 55. INS agents are specifically instructed, however, that they may not *detain* individuals for inquiry into their right to enter or remain in the United States except on a reasonable suspicion that they are illegally present in this country. See J.A. 41. As we argue below, the INS's instructions to its agents are more restrictive than the Fourth Amendment or the relevant statutes require. See pages 32-40 & note 25, *infra*.

<sup>8</sup> For example, the employee might be present in the United States as a permanent resident alien or on a temporary basis with a valid work permit.

migration papers.<sup>9</sup> See, *e.g.*, J.A. 44, 47, 83-88, 94-96, 101-106, 115, 120-122, 123-124, 134, 138-139, 152.<sup>10</sup>

Throughout the surveys, the agents used no force (except when necessary to effect the arrests of illegal aliens). The employees were free to walk around within the factory and to continue with their work. Generally, upon the arrival of the INS agents, cries of "la migra" (the immigration) were heard and some employees would attempt to flee or hide. The agents did not give chase after these employees, but rather continued their survey until they reached the hiding place of the illegal aliens. See, *e.g.*, J.A. 81-84, 90, 91, 92-93.

b. The respondents are four employees who were present during the surveys at their work place. None of the respondents was arrested. Respondent Delgado is employed by Davis Pleating and is a citizen born in Mayaguez, Puerto Rico. J.A. 79. During the January survey, he was not questioned by the INS agents regarding his citizenship or immigration status, although he was asked by one agent if he had a key for the back door. J.A. 86, 90. Delgado walked freely throughout the factory during the survey,

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<sup>9</sup> Every alien is required by statute to carry his certificate of alien registration or alien registration receipt card with him at all times. 8 U.S.C. 1304(e).

<sup>10</sup> Those aliens who are unable to produce documentation evidencing their right to remain in the United States are detained while the agents attempt to ascertain whether the aliens are legally present in this country. In a majority of cases, an individual who is here illegally will admit his illegal status to the INS agent. J.A. 49-50. If the agents confirm an alien's illegal status and he appears likely to flee, he is arrested and subsequently is either deported or permitted to depart the United States voluntarily. J.A. 44.

which lasted between one and one and a half hours. J.A. 85, 90. During the September survey, Delgado again was allowed to walk throughout the factory. J.A. 93-94. On this occasion an INS agent asked Delgado where he was born. When Delgado responded that he was born in Mayaguez, Puerto Rico, the agent moved on to another worker. J.A. 94-95. While the survey was being conducted, Delgado left the factory building to load a truck. He was neither stopped nor questioned by the INS agent stationed at that door. J.A. 98.

Respondent Correa also worked at Davis Pleating. She is a United States citizen who was born in Southern California. J.A. 100. During the surveys, she was permitted to walk through the factory without interference from the immigration officers. J.A. 109-113. She was asked no questions during the January survey. J.A. 106. In September, however, an agent asked Correa, as she was walking through the factory, where she was born. After responding that she was born in California, Correa continued on her way without further questioning. J.A. 115.

Respondent Labonte also worked at Davis Pleating. She is a resident alien who was born in Mexico. During the September survey she was seated in front of a machine when an agent tapped her on the shoulder and asked to see her immigration papers. She displayed her papers and was not questioned further. J.A. 138-140. At one point, Labonte exited the factory, approached some INS officers outside the building, and asked them why they were taking the illegal aliens away. J.A. 136-137, 143.

Respondent Miramontes, a resident alien, worked at Mr. Pleat. J.A. 117. When the October survey began, Miramontes was walking to her work station

from an office when an INS agent asked her if she was a citizen. When she responded that she was not, he asked to see her papers. Miramontes showed her papers, and the agent continued on his way. J.A. 120-121. Miramontes had no other contact with the agents. J.A. 129.<sup>11</sup>

3. In 1978, respondents filed two separate actions for declaratory and injunctive relief in the United States District Court for the Central District of California, challenging the constitutionality of INS factory surveys. J.A. 6-17, 18-29. The actions (which were subsequently consolidated) were brought by respondents on behalf of a class consisting of all persons of Latin ancestry employed in the garment industry or any other industry in the Central District of California. J.A. 8, 30. In addition, the International Ladies' Garment Workers' Union (ILGWU) was named as a plaintiff in both complaints. J.A. 6-7, 18-19.

Respondents' principal contention was that the factory surveys violate the Fourth Amendment.<sup>12</sup> They contended that INS agents may not enter a factory for the purpose of conducting a survey without either the consent of the employees or a warrant

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<sup>11</sup> The first amended complaint in No. CV 78-0740-LEW (PX) alleged that a fifth named plaintiff, Guadalupe Rodriguez, was arrested during the survey at Mr. Pleat and transported to Mexico despite his having informed the INS agents that he was a United States citizen. J.A. 13. In fact, however, Rodriguez was an illegal alien who was properly arrested; when petitioners pointed out this fact, Rodriguez was dropped as a party to the action.

<sup>12</sup> Respondents also asserted that the surveys violate the equal protection component of the Fifth Amendment's Due Process Clause, but the courts below did not reach this issue. See Pet. App. 7a-8a n.7.



specifically naming the individuals to be questioned. They also contended that INS agents may not stop and question individual employees without their consent in the course of a factory survey unless the agents have either a warrant naming those individuals, probable cause to arrest those individuals without a warrant, or reasonable suspicion that the individuals are aliens unlawfully in the United States. J.A. 16-17, 27-28.

The district court denied respondents' motion to certify the class and also dismissed the ILGWU as a party for lack of standing. See Pet. App. 6a, 58a-60a. Thereafter, the district court granted petitioners' motion for partial summary judgment, holding that the owner of a workplace may give a valid consent to entry by the INS agents and that a warrant authorizing such an entry need not identify each person to be questioned by the agents. Pet. App. 53a-57a. Subsequently, the court entered supplemental findings of fact and conclusions of law holding, *inter alia*, that the two warrants issued to search for illegal aliens at Davis Pleating were valid and were based upon probable cause. Pet. App. 49a-52a.

On a second motion for summary judgment, the district court considered the Fourth Amendment implications of the manner in which the factory surveys were conducted. The court concluded that none of the respondents had been arrested or detained and that INS agents are entitled to pose questions to anyone so long as they do not detain the person. Alternatively, relying on *United States v. Martinez-Fuerte*, *supra*, the court held that, even if respondents technically "had experienced some form of seizure by placement of INS investigators at the



factory exits, the degree of intrusion on [respondents] was so limited that there was no violation of the Fourth Amendment." Pet. App. 47a. The court also concluded (*ibid.*) that, under 8 U.S.C. 1357(a) (1), any person believed to be an alien may be questioned about his right to be in the United States. Accordingly, the court found that respondents' Fourth Amendment rights had not been violated in the course of the factory surveys, and it granted petitioners' motion for summary judgment. *Id.* at 45a-48a.

4. The court of appeals reversed. Pet. App. 1a-43a. The court held that the method of executing the factory surveys, including stationing agents at the exits to prevent illegal aliens from escaping, constituted a seizure of the entire work force and that such a seizure violated the Fourth Amendment in the absence of a "reasonable, individualized suspicion of illegal alienage of each detained worker prior to the execution of the surveys." *Id.* at 40a.<sup>13</sup>

Relying heavily (see Pet. App. 13a-16a), on *Illinois Migrant Council v. Pilliod*, 531 F. Supp. 1011 (N.D. Ill. 1982), the court of appeals first concluded that the execution of the factory surveys, particularly the stationing of agents at the exits, "sufficiently intrudes upon the privacy and security interests of the workers that a seizure of the workforce occurs during the surveys." *Id.* at 12a. The court acknowledged that the respondents "had varying degrees of freedom to circulate through or exit the factories" (*id.* at 19a),

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<sup>13</sup> The court of appeals upheld the district court's denial of class certification. Pet. App. 43a n.24. It did not reach the question whether the district court correctly dismissed the ILGWU as a party (*ibid.*), and it did not address the validity of the search warrants. *Id.* at 9a.

but it nonetheless ruled that the work force was seized for the entire duration of the survey. The court stated that the surprise appearance of a substantial number of INS agents, the announcement of their authority and display of badges, their method of proceeding systematically down the rows of workers, and their use of handcuffs to detain suspected illegal aliens "represented a threatening presence \* \* \* to the reasonable worker." *Ibid.* Moreover, the court observed that the practice of positioning agents at the exits in order to apprehend those attempting to flee "indicated to the entire workforce that departures were not to be contemplated." *Ibid.* In these circumstances, the court concluded that "even before individual questioning began, a reasonable worker 'would have believed that he was not free to leave' " (*id.* at 20a, quoting *United States v. Anderson*, 663 F.2d 934, 939 (9th Cir. 1981)), and, hence, the entire work force was seized within the meaning of the Fourth Amendment for the duration of the survey.<sup>14</sup>

The court of appeals then held that the Fourth Amendment permits the INS to detain an individual for questioning only on the basis of a reasonable suspicion that the person detained is an alien *illegally* in this country. Pet. App. 22a-32a. The court noted that the Fourth Amendment generally requires a suspicion of illegality to support a limited detention and concluded that the same requirement applies

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<sup>14</sup> The court did, however, reject respondents' contention under *Dunaway v. New York*, 442 U.S. 200 (1979), that the manner in which the factory surveys were conducted constituted an arrest of the work force requiring probable cause. Pet. App. 11a-12a. The court specifically found that no one was arrested "until the investigators had sufficient probable cause to suspect that those in custody were in this country without proper documentation." *Id.* at 12a.

here. *Id.* at 30a-32a. Although it recognized that 8 U.S.C. 1357(a)(1) expressly authorizes INS agents "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," without any requirement of a suspicion of illegal presence, the court held that under the Fourth Amendment any questioning pursuant to Section 1357(a)(1) that is accompanied by a seizure of the person may be conducted only when an agent reasonably suspects that the individual being questioned is an alien illegally present in this country. Pet. App. 30a-32a. A different rule, the court concluded, "would grant the INS impermissible discretion to detain and question at whim." *Id.* at 32a.

The court of appeals further held that any detentive questioning of an alien had to be based on an *individualized* suspicion of illegal alienage. Pet. App. 32a-39a. The court acknowledged that this Court in *United States v. Martinez-Fuerte*, *supra*, had recognized that a seizure within the meaning of the Fourth Amendment could be effected in some circumstances in the absence of an individualized suspicion of illegality, but it distinguished *Martinez-Fuerte* on the ground that the permanent checkpoint stop involved in that case entailed a lesser intrusion than the factory surveys involved here. Pet. App. 32a-35a. Accordingly, the court concluded that reasonable suspicion or even probable cause to believe that numerous illegal aliens are working in a factory is insufficient to justify the seizure of any individual alien. *Id.* at 35a-39a.

Finally, applying the foregoing principles to the instant case, the court of appeals held that the surveys violated the Fourth Amendment because they resulted in the seizure of the entire work force when

the INS agents did not have an individualized suspicion that each employee was an illegal alien. Pet. App. 39a-42a.

### SUMMARY OF ARGUMENT

The court of appeals in this case has held that the manner of executing INS factory surveys, in particular the practice of positioning INS agents at the doors to prevent the escape of illegal aliens, constitutes a "seizure" of the entire work force for the duration of the survey, and that the Fourth Amendment prohibits INS agents from detaining any employee for questioning regarding his citizenship status during a survey unless the agents have a reasonable suspicion of illegal alienage with respect to that particular employee. It is obvious that this holding—which requires the INS to have a reasonable suspicion of illegal alienage with respect to every employee who happens to be on the premises during a factory survey—is one that the INS will never be able to satisfy. The court thus has effectively invalidated an extremely effective procedure for locating and apprehending illegal aliens who have attempted to assimilate themselves into the general population.

A. The court of appeals erred in concluding that the stationing of agents at exits during a factory survey results in a "seizure" of the entire work force. The surveys are conducted during normal working hours, when the employees presumably are required in any event to be present at their work stations. In these circumstances, it is difficult to perceive how the employees' "freedom to leave" is meaningfully curtailed by the positioning of agents at the doors. Moreover, because the purpose of the surveys—to apprehend illegal aliens—is manifest, a citizen or

lawfully present alien should not reasonably feel threatened or restrained because of the manner in which the surveys are executed.

B. Even if the stationing of agents at factory exits is in some technical sense a "seizure" of the entire work force, that seizure is nevertheless "reasonable" under the Fourth Amendment. In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Court held that the Border Patrol may operate permanent checkpoints on major roads leading away from the border, even though the operation of the checkpoints results in the seizure of each automobile as it reaches the checkpoint and even though some vehicles are referred to a secondary location for questioning for up to five minutes without any basis for suspicion that they contain illegal aliens. The Court reached this result by application of the Fourth Amendment's general "reasonableness" standard, under which a particular law enforcement practice is judged by balancing the intrusion on the individual's Fourth Amendment interests against the governmental interests that are promoted by the practice.

Under this test, the governmental interests that support the practice of stationing agents at factory exits during a survey substantially outweigh the minimal intrusion, if any, that this practice entails on employees' Fourth Amendment interests. By focusing on businesses that employ significant numbers of illegal aliens, factory surveys are by far the most effective means of apprehending illegal aliens who have eluded the Border Patrol. The use of such surveys thus increases the number of jobs available to lawful residents and deters the arrival of still more illegal aliens. Moreover, the manner in which the surveys are conducted, including the stationing of agents at

the doors to prevent the escape of illegal aliens, is entirely reasonable and necessary if the surveys are to be effective in accomplishing their objective. On the other hand, the alleged seizure involved in a factory survey—during which workers are free to go about their business—is purely theoretical, and the subjective intrusion on a lawful resident worker is virtually nonexistent because the worker knows that the survey is directed at apprehending illegal aliens and that at most he will be asked only one or two questions and requested to display his immigration documents.

C. Although we doubt that any employee is seized at all within the meaning of the Fourth Amendment when he is approached by an INS agent during a factory survey and questioned about his citizenship status, to the extent that such encounters do entail a seizure of the employee, the court of appeals clearly erred in holding that INS agents may not engage in such detentive questioning unless they have a reasonable suspicion of *illegal* alienage with regard to each employee questioned.

1. In our view, the Fourth Amendment generally permits INS agents to stop and question a person as to his citizenship status on the basis of a reasonable suspicion of alienage alone. In the exercise of its broad powers over immigration, Congress has provided that every registered alien "shall at all times carry with him and have in his personal possession" his alien registration document. 8 U.S.C. 1304(e). In addition, Congress has empowered immigration officers "to interrogate any \* \* \* person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. 1357(a)(1). Under this statutory scheme, Congress has conditioned each alien's privilege of residing or working

in the United States on fulfillment of the obligation to carry at all times a registration card evidencing his right to be here. Aliens who choose to reside or work here accept that obligation and, by the same token, the obligations to respond to questions concerning their immigration status and to produce proper documentation when requested to do so by INS officials. If they were free to disregard such a request, the requirement to carry identification would be rendered virtually meaningless.

Contrary to the view of the court of appeals, it is not "arbitrary" for INS agents, on the basis of objective, articulable facts giving rise to a reasonable suspicion that a person is an alien, to stop and question the person as to whether he is an alien and whether he is carrying with him the proper alien registration documents required by law. The requirement that there be reasonable and particularized suspicion underlying the selection of particular individuals for detention and questioning constitutes an effective curb on arbitrary official behavior.

2. Even if detentions of employees for questioning during factory surveys must be based on reasonable suspicion of illegal alienage, "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *Martinez-Fuerte*, 428 U.S. at 561. Obviously, when his suspicion focuses on a single individual, a law enforcement officer wishing to detain the individual must have articulable grounds to suspect that that individual may be engaged in illegal activity. But there is no reason why, in other contexts, the basis for suspicion must be "individualized." Thus, for example, if an officer knows that seven out of ten persons are illegal aliens, the knowledge that three of the persons will turn out to be innocent does not alter the fact that, in the



absence of additional information dispelling suspicion with respect to a particular individual, the officer has a reasonable suspicion (indeed, probable cause) of illegal alienage with respect to each person sufficient to justify an initial detention for purposes of inquiry.

### ARGUMENT

#### **TO THE EXTENT THAT FACTORY WORKERS ARE SEIZED AT ALL IN THE COURSE OF INS SURVEYS, SUCH SEIZURES ARE REASONABLE UNDER THE FOURTH AMENDMENT**

The court of appeals did not question the right of INS agents to enter business premises, under the authority of either a warrant or the consent of the owner, in order to conduct a factory survey to identify and apprehend suspected illegal aliens. Accordingly, the questions presented in this case relate only to whether the Fourth Amendment is violated by the manner in which INS agents conduct surveys such as those carried out at respondents' places of employment. Moreover, although the Fourth Amendment governs both "searches" and "seizures," there is no contention here that factory employees are searched in the course of INS surveys. Thus, the case turns on the extent, if any, to which employees such as respondents are seized during the surveys and, if they are, whether their seizure is "reasonable" under the Fourth Amendment.

We note at the outset that there are two different species of asserted seizures involved in this case. The first arises from the court of appeals' holding that, by stationing agents at the factory doors, the INS "seizes" the entire work force for the duration of each survey. We argue below that the stationing of agents at the doors to prevent illegal aliens from es-



caping does not result in a seizure of the entire work force, and even if it does in a technical sense amount to such a seizure, any intrusion on the freedom of law-abiding workers is so minimal that it is reasonable under the Fourth Amendment when considered in light of the practical necessity for the procedure.

The second type of seizure said to be involved in this case arises from the questioning of individual employees regarding their immigration status in the course of a factory survey. It is our position that INS agents generally may inquire about a person's immigration status without any suspicion whatever so long as the inquiry is not accompanied by a seizure within the meaning of the Fourth Amendment, and that they may detain a person briefly in the course of such an inquiry on the basis of a reasonable suspicion of alienage, without a showing of illegal alienage. Moreover, even if a reasonable suspicion of illegal alienage is required to stop a single individual for the purpose of questioning him about his immigration status, we submit that individualized suspicion is not required to stop and question in the context of a factory survey, where the agents have reason to believe that a substantial number of the workers are in this country illegally.

The court of appeals acknowledged that none of the seizures involved in this case is so intrusive as to require probable cause to arrest. See Pet. App. 11a-12a (distinguishing *Dunaway v. New York*, 442 U.S. 200 (1979)). Under settled principles, the lawfulness of seizures that are less intrusive than a traditional arrest is assessed by application of "the ultimate standard of reasonableness embodied in the Fourth Amendment." *Michigan v. Summers*, 452 U.S. 692, 699-700 (1981) (footnote omitted). In this area of

Fourth Amendment law, "[t]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *United States v. Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 9, quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). See also, e.g., *United States v. Place*, No. 81-1617 (June 20, 1983), slip op. 6-7; *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

Here, the court of appeals concluded that the manner of executing the factory surveys, particularly the stationing of INS agents at the doors, results in the seizure of the *entire* work force for the duration of the survey and that such a seizure is unconstitutional unless the agents have a reasonable suspicion of *illegal* alienage with respect to *each* employee who happens to be present on the premises. The court reached this extraordinary result on the basis of a mechanistic application of general Fourth Amendment rules fashioned in other contexts, without engaging in the necessary task of evaluating the propriety of the agents' actions under the Fourth Amendment's reasonableness standard. As we show below, the intrusion, if any, on factory workers' Fourth Amendment interests that results from the execution of surveys at their places of employment is insignificant when contrasted with the substantial government interests in apprehending aliens who have entered or remained in this country illegally and who are "competing with citizens and legal resident aliens for jobs." *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 878-879. Accordingly, we submit that factory surveys

such as those involved in this case are reasonable under the Fourth Amendment.

**A. The Stationing of INS Agents at Exits During a Factory Survey Does Not Result in the "Seizure" of the Entire Work Force**

In our view, the court of appeals seriously erred in holding that the stationing of agents at exits during a factory survey constitutes an illegal seizure of the entire work force. The court purportedly applied the test set forth by Justice Stewart in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (footnote omitted), that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." See Pet. App. 12a-13a, 19a-20a. See also *Florida v. Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 5-6, 10 (plurality opinion); *id.* at 2 (Blackmun, J., dissenting); *id.* at 5 n.3 (Rehnquist, J., dissenting); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). However, it simply ignores the realities of the situation to hold that every worker in a factory is "seized" under this test as soon as INS agents commence a factory survey by taking up positions at the exits and before any questioning at all has occurred.

Preliminarily, we note that it is only in a theoretical sense that the work force here, or in any typical factory survey, can be characterized as having a "freedom to leave" that is restrained by the appearance of the INS. The factory surveys in this case were conducted entirely during normal working hours. See J.A. 81, 108, 133. At such times the employees presumably were obligated to their employer to be present at their work stations perform-

ing their employment duties; accordingly, quite apart from the appearance of the INS agents, the employees were not "free to leave" the factory in any real sense. Given the undisputed fact that during the surveys employees, including respondents, were free to walk through or exit the factory in the course of performing their duties (J.A. 90, 93-94, 98, 109-113, 136-137, 143), the court of appeals' opinion does not explain how the INS agents here restrained the "freedom to leave" of members of the work force in any meaningful sense.

More fundamentally, there is no basis for finding that employees who were not illegal aliens would have felt their freedom restrained by the stationing of agents at the exits. The purpose of the surveys was manifest and was announced by the INS agents, namely, to apprehend illegal aliens. See J.A. 152. Hence, as respondent Correa candidly testified (J.A. 116), a citizen or alien legally present in this country knew immediately that he or she personally had nothing to fear from the INS; such individuals could not reasonably have felt threatened or restrained by the survey. They reasonably should have understood that the INS agents at the exits were positioned to stop only illegal aliens from leaving, not to curtail the movements of others. Thus, contrary to the court of appeals' suggestion (Pet. App. 11a), a citizen or legal alien should not have felt coerced if he or she saw workers arrested who were trying to flee.

Respondents argue (Br. in Opp. 6-7, 8) that the court of appeals based its holding that the factory surveys resulted in the seizure of the entire work force not only on the stationing of agents at the exits but also on other factors, such as the element of surprise, the number of agents involved, their display

of badges, their manner of proceeding methodically through the factory, and the use of handcuffs to detain suspected illegal aliens. But these actions, like the positioning of agents at the doors, clearly are directed at apprehending illegal aliens, and thus employees such as respondents who are citizens or lawfully present aliens have no reason to conclude that their freedom of movement is restricted by the manner in which the surveys are conducted.<sup>15</sup> Similarly, the fact that the surveys are often accompanied by shouts of "la migra" and the flight of a number of employees does not transform them into seizures of the entire work force. These voluntary actions, undertaken by illegal aliens in the work force to avoid apprehension, are not attributable to the INS agents and constitute no intrusion on the freedom of employees who are lawfully present in the United States.<sup>16</sup>

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<sup>15</sup> Moreover, it is clear that the dispositive factor in the court of appeals' analysis was the stationing of agents at the exits. Indeed, in *Zepeda v. INS*, 708 F.2d 355, 363 (9th Cir. 1983), the court of appeals specifically stated that its holding in this case that an INS factory survey constitutes a seizure of the work force rested on the fact that agents are stationed at the doors during the survey.

<sup>16</sup> Respondents contend (Br. in Opp. 13-14) that the surveys raise fears among law-abiding workers that they may be mistaken for illegal aliens and arrested. But these fears have no objective basis grounded in the manner in which the surveys are conducted. Indeed, none of respondents was arrested or threatened with arrest. (The only original plaintiff who was subjected to an arrest—Guadalupe Rodriguez—was in fact an illegal alien. See note 11, *supra*.) At most, respondents were asked one or two questions about their immigration status and, where appropriate, were asked to produce their alien registration papers. Although respondent Delgado claimed

**B. Even if the Stationing of INS Agents at Factory Exits Results in a Technical "Seizure" of the Entire Work Force, That Seizure is Reasonable Under the Fourth Amendment**

Even if the court of appeals were correct in concluding that the stationing of agents at the exits is in some technical sense a seizure of the entire work force, including those employees who are not illegal aliens, the court nevertheless erred in finding that such precautionary action violates the Fourth Amendment. This Court has recognized that a limited intrusion that rises to the level of a Fourth Amendment "seizure" may in some circumstances be effected in the absence of an individualized basis for suspicion. See *United States v. Martinez-Fuerte*, *supra*; *United States v. Villamonte-Marquez*, *supra*.

In *Martinez-Fuerte*, the Court upheld the authority of the Border Patrol to maintain permanent checkpoints at or near intersections of important roads leading away from the border, at which all vehicles are required to come to a virtual halt as they pass by, even though the Court assumed that each car is thereby "seized" within the meaning of the Fourth Amendment. See 428 U.S. at 546 n.1, 556. Moreover, the Court held that the Constitution permits the selective referral of some vehicles to a secondary

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that he overheard one agent remark that he would have to come back and check Delgado out more carefully on a subsequent visit (J.A. 94), there is no evidence that the agent in fact did return to question Delgado and the INS received no complaints from Delgado or anyone else regarding the conduct of any of its agents during the three surveys at issue here. Moreover, even assuming that the agent's comment was improper, it provides no basis for concluding that the survey procedure implicates legitimate Fourth Amendment concerns, justifying a grant of declaratory or injunctive relief.

checkpoint for three to five minutes of questioning without an articulable basis for suspecting that the vehicle contains illegal aliens. *Id.* at 563-564.

The Court in *Martinez-Fuerte* noted that there is a substantial public interest in maintaining checkpoints in order to control the flow of illegal aliens into this country. 428 U.S. at 556-557. Routine checkpoint inquiries result in the apprehension of large numbers of illegal aliens and deter others from entering and attempting to reach interior points away from the border. At the same time, the Court pointed out that the intrusion on Fourth Amendment interests occasioned by checkpoint stops is quite limited. *Id.* at 557-560. The stops involve only a brief detention, with no search of the vehicle or its occupants. Moreover, unlike roving patrol stops of automobiles, "the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop. \* \* \* 'At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.'" *Id.* at 558, quoting *United States v. Ortiz*, 422 U.S. 891, 894-895 (1975). Finally, although the practice of selective referral "may involve some annoyance, \* \* \* it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature." *Martinez-Fuerte*, 428 U.S. at 560.

Here, as in *Martinez-Fuerte*, the governmental interests that make it reasonable to station agents at factory exits during a survey outweigh the minimal intrusion occasioned thereby, and hence any theoretical seizure of the entire work force does not violate



the Fourth Amendment. This Court has recognized that most aliens who enter or remain illegally in the United States are drawn by the fact that economic opportunities are significantly greater here than in their native countries. See *Martinez-Fuerte*, 428 U.S. at 551. Thus, as we have already noted (see pages 3-4, *supra*), factory surveys are the most effective means of detecting and apprehending illegal aliens who have avoided detection by the Border Patrol. The use of such surveys allows the INS to focus its limited resources on businesses that are known to employ significant numbers of illegal aliens. In addition, by conducting surveys that result in apprehension of illegal alien workers, the government helps to increase the number of employment opportunities that are available to persons who are lawfully in the United States. By the same token, an effective program of enforcing the immigration laws in places of employment will have the salutary goal of deterring the arrival of illegal aliens. Persons from other countries will have less incentive to come here illegally in search of employment if they know that the immigration laws are effectively enforced in the work place. Finally, the manner in which the surveys are carried out, including the stationing of agents at the doors, is entirely reasonable if the surveys are to be effective in accomplishing their purpose.

In contrast to the substantial public interests advanced by factory surveys, the intrusion on the Fourth Amendment interests of the workers—to the extent that such an intrusion rises to the level of a seizure at all—is minimal indeed. Here, as in *Martinez-Fuerte*, the person “can see visible signs of the officers’ authority” because the agents display their badges during the surveys. Moreover, any brief con-



tact that a law-abiding worker may have with an agent "should not be frightening or offensive because of [its] public and relatively routine nature."

The court of appeals, however, sought to distinguish *Martinez-Fuerte* on the ground that the checkpoint stop at issue in that case involved a lesser intrusion than a factory survey. Pet. App. 32a-35a. The court's purported distinction does not withstand analysis. To be sure, employees at a factory do not know in advance when their workplace is going to be surveyed, while a traveler familiar with the highway in *Martinez-Fuerte* would not have been surprised to come upon the checkpoint (although he could not have anticipated being selected for secondary referral). In the most significant respects, however, the alleged seizure involved in the factory survey is substantially *less* intrusive than the checkpoint stop in *Martinez-Fuerte*. First, the alleged seizure in connection with the factory survey is only theoretical; the workers are free to go about their business and, as a practical matter, they engage in the same activity that they would if the INS did not appear. By contrast, the traveler stopped at a checkpoint is truly "stopped" and is diverted completely for up to five minutes from what he would otherwise have been doing.<sup>17</sup> Furthermore, it is difficult to see

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<sup>17</sup> The court of appeals expressed the view that the detention in *Martinez-Fuerte* was of much shorter duration than that involved here. See Pet. App. 34a. But the court's conclusion that each individual member of the work force is seized for one and one-half hours during a factory survey is manifestly erroneous. While the entire survey, during which the employees are free to continue to go about their work, may last that long, it is clear that, to the extent there is any detention at all, the maximum that any individual who wishes

how the factory survey could engender any anxiety in a reasonable individual who is lawfully in this country; because he is immediately aware that the purpose of the survey is to apprehend illegal aliens, he knows that he is not subject to arrest and at worst will be asked only to answer a question about his citizenship status or show proper documentation to the agents. At a checkpoint, however, an individual singled out for selective referral will be considerably more anxious because he often will not be aware of the reason he has been singled out, and hence the seizure is significantly more intrusive for him.

The court of appeals' decision severely undermines the utility of INS factory surveys by effectively barring under any circumstances the stationing of agents at exits to prevent illegal aliens from fleeing during a factory survey. Under the reasoning of the court of appeals, even if INS agents have probable cause to believe that 99 out of 100 persons present in a factory are illegal aliens, agents cannot be stationed at the exits because that would constitute an unlawful seizure of the one person inside who is not an illegal alien. Moreover, the result reached by the court of appeals does not turn on the absence of a search warrant. Indeed, two of the three factory surveys underlying the present litigation were supported by warrants based upon probable cause to believe that a number of the employees at the factory to be inspected were illegal aliens.

Of course, we do not dispute that the manner in which a warrant is executed is subject to review as to reasonableness without regard to the validity of the

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to leave is detained is the very short time needed for him to answer an agent's question regarding his citizenship status, after which he clearly is free to leave.

warrant itself. See *Dalia v. United States*, 441 U.S. 238, 258 (1979). But under the court of appeals' reasoning, even if a magistrate were to issue a warrant authorizing INS agents to search a particular factory for certain named persons believed to be illegal aliens, it apparently would still be unlawful to station agents at the exits while searching for the employees named in the warrant because of the incidental "seizure" of the other employees not named in the warrant.<sup>18</sup> (By the same token, it presumably would be unlawful for law enforcement officers executing arrest warrants at particular premises to station themselves at the door in order temporarily to bar egress, so long as a single person inside the premises was not among those for whom the officers had arrest warrants.)

Clearly, the effectiveness of factory surveys will be greatly diminished, if not totally destroyed, if the INS is not permitted to station agents at the doors of a factory to prevent escape while the survey is being conducted. Indeed, the court of appeals itself recognized that its decision barring the stationing of agents at the exits would reduce substantially the number of illegal aliens apprehended and hence

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<sup>18</sup> We proffer this hypothetical simply to illustrate the extreme implications of the court of appeals' logic. As a practical matter, in the relatively small number of cases in which a warrant is used as a basis for entry into a factory to conduct a survey, the warrant does not specifically name suspected illegal aliens employed at the factory. The record demonstrates the difficulties that would be entailed in seeking to obtain that level of specificity in factory survey warrants. The composition of the work force in factories at which surveys are most often performed is not stable and changes constantly. In addition, in the experience of the INS, employers' records often list false names for the employees and inaccurate data concerning the workers' citizenship status. See J.A. 44-45.

hinder INS enforcement efforts. Pet. App. 16a, 42a. Moreover, to the extent the INS is able to continue with such surveys at all in light of the court's opinion, the disorder and danger involved in conducting the surveys will be greatly increased because illegal aliens will be encouraged to flee by the absence of anyone visibly guarding the exits.<sup>19</sup>

The error of the court of appeals' analysis is manifested by the unacceptable implications of its holding in analogous contexts. According to the decision below, if one or more criminal fugitives were to flee into a building (such as a department store) that also contained innocent persons, the police would not be permitted to guard the exits of the building and briefly check everyone who exited because that would constitute an illegal seizure of the innocent occupants. Indeed, under the court of appeals' decision, it is difficult to discern the constitutional basis for a roadblock to catch a fleeing criminal or to check for safety violations, since innocent persons would surely be stopped. But this Court has indicated that such practices are reasonable under the Fourth Amendment. See *United States v. Villamonte-Marquez*, *supra*, slip op. 9-10; *Delaware v. Prouse*, *supra*, 440 U.S. at 663; *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 560 n.14.

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<sup>19</sup> The decision of the court of appeals presumably would not bar stationing agents near the exits but outside the factory and out of the view of its workers. See Pet. App. 18a-19a. Because this procedure would not discourage attempts to flee and would not be nearly as effective in apprehending those who seek to flee, it is likely to cause even more disruption to persons like respondents, as well as to increase the dangers to agents and fleeing aliens.

**C. The Fourth Amendment Does Not Require INS Agents to Have a Reasonable Suspicion That Each Employee Questioned as to Citizenship Status During a Factory Survey is an Illegal Alien**

Thus far we have addressed the court of appeals' conclusion that the factory surveys result in the seizure of the work force in the aggregate. Having shown that the general procedures employed by INS agents during a survey, particularly the stationing of agents at the exits, do not entail a seizure of the entire work force for the duration of the survey, and that such procedures are reasonable in any event, we now turn to consider whether the particular encounters between INS agents and individual employees in the course of a factory survey, in which the employees are questioned concerning their citizenship status, violate the employees' Fourth Amendment rights.

During the course of a factory survey, INS agents approach employees who they have reason to suspect are aliens and question those employees concerning their immigration status. The first question is intended to reveal whether the individual is a citizen. The agent may ask the employee whether he is a citizen of the United States or he may inquire as to the employee's place of birth. If the employee answers that he was born in the United States or is a United States citizen, and if there is no reason to disbelieve that response, no further questions are asked.<sup>20</sup> If the employee indicates that he is not a citizen, the agent generally requests the employee to produce his alien registration document. Once the proper papers are

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<sup>20</sup> If the agent has reason to believe that the employee is lying about his citizenship status, he may inquire further or ask for some identification. But normally, the agent moves on when an employee claims to be a citizen.

produced, the documented alien is free to continue with his work. See J.A. 44, 87-88, 94-96, 105, 115, 120, 123, 138-139, 152.

The encounters between the INS agents and the respondents that are described in the record are illustrative of the nature and extent of the contacts between agents and individual workers in the course of a typical survey. During the September 1977 survey at Davis Pleating, INS agents approached respondents Delgado and Correa in separate incidents and asked where each was born. When Delgado responded that he was born in Puerto Rico and Correa responded that she was born in California, the agents moved on to question other workers. J.A. 94-95, 115.<sup>21</sup> Similarly, after respondents Miramontes and Labonte (both of whom are resident aliens) produced their immigration documents at the request of INS agents, they were not questioned further and were permitted to go about their business. J.A. 120-121, 138-140.

In their complaints, respondents contended that their Fourth Amendment rights were violated by these encounters, and that INS agents may not stop and question individual workers during a survey unless they have a reasonable suspicion that each employee so questioned is an alien illegally in this country. J.A. 16-17, 27-28. The district court rejected this contention, concluding that employees are not seized at all during a typical survey and that the Fourth Amendment does not prohibit law enforcement officers from questioning anyone so long as they have not effected a seizure of that person. The court

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<sup>21</sup> During the January 1977 survey, INS agents did not approach or question Correa at all, and Delgado's only contact with the agents occurred when he was asked whether he had a key for the back door. J.A. 90, 106.

also noted that even if employees are technically seized for questioning during a survey, the employees' Fourth Amendment rights are not violated in view of the minimal nature of the intrusion. Pet. App. 47a.

The court of appeals viewed this case as presenting two related issues concerning the constitutional standard applicable to the questioning by INS agents of employees concerning their citizenship status during factory surveys: (1) whether such questioning "is constitutionally valid when based upon a suspicion of alienage alone," and (2) "whether less than individualized suspicion is sufficient for questioning workers present in a factory known to employ illegal aliens." Pet. App. 22a. The court went on to hold that the Fourth Amendment requires a reasonable suspicion of illegal alienage with respect to each employee detained for questioning in the course of a factory survey. As we now demonstrate, the court's holding is fundamentally in error, both with respect to the requirement of a suspicion of *illegal* alienage and also with respect to the requirement that that suspicion be *individualized*.

**1. *The Fourth Amendment Permits an INS Agent to Stop and Question a Person Reasonably Suspected of Being an Alien as to His "Right to Be or to Remain in the United States"***

We note at the outset of this discussion that the kind of questioning conducted in the normal course of a factory survey—including specifically all the questioning to which respondents asserted they were subjected (J.A. 94-95, 115, 120-121, 138-140)—does not constitute a seizure of the workers' person regulated by the Fourth Amendment. The initial brief inquiry regarding citizenship is not accompanied by any physical force or show of authority from which a



citizen would reasonably conclude that he or she was in danger of being forcibly detained. Rather, all that occurs is an approach and the polite posing of a simple question or two, action that does not constitute a seizure. See *Florida v. Royer*, *supra*, slip op. 5-6, 10 (plurality opinion); *id.* at 2 (Blackmun, J., dissenting); *id.* at 5 n.3 (Rehnquist, J., dissenting); *United States v. Mendenhall*, *supra*, 446 U.S. at 554 (opinion of Stewart, J.); *Terry v. Ohio*, *supra*, 392 U.S. at 19 n.16. Since nothing more than a brief consensual encounter characterizes the typical interaction between the agents and citizen workers or lawfully resident aliens, it cannot be said that any substantial Fourth Amendment issue even arises with respect to most of what transpires at the factory premises during the survey.

It is true, however, that the INS believes its agents possess the right to detain for further investigation a person who refuses voluntary cooperation if they suspect that person to be an alien—legal or illegal. Rejecting this position, the court of appeals held that an INS agent may not detain an employee for questioning during a factory survey unless he has a reasonable suspicion that the employee is an illegal alien. We submit that a reasonable suspicion of alienage is sufficient in this context to satisfy the reasonableness requirement of the Fourth Amendment.

In *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 881, this Court held that a Border Patrol officer may not make a roving patrol stop of a vehicle in areas near the border unless the officer has a reasonable suspicion that the vehicle contains aliens who are illegally in the country. The Court, however, left open the question presented here, concerning the proper standard for a brief investigatory stop of an individual outside the automobile context. See *id.* at 884 n.9. In so doing, the Court assumed that "the

broad congressional power over immigration \* \* \* authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in this country," but it expressed the view that the Fourth Amendment "forbids stopping or detaining persons for questioning about their citizenship on less than *a reasonable suspicion that they may be aliens.*" *Id.* at 884 (emphasis added). The Court's statement in *Brignoni-Ponce* is fully consistent with our position in this case.

It is well settled that Congress has broad powers over immigration matters. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 765-767 (1972). In the exercise of these powers, Congress has provided by statute for the registration of all aliens in the United States. 8 U.S.C. 1302, 1304. Under this registration program, each alien must submit to fingerprinting and must provide information concerning the date and place of his entry into the United States, the activities in which he intends to engage, the length of time he expects to remain in the United States, and his criminal record. 8 U.S.C. 1304(a). The statute further provides that every adult alien who has been registered shall be issued a certificate of alien registration or an alien registration receipt card, which he must "carry with him and have in his personal possession" at all times. 8 U.S.C. 1304(d) and (e).<sup>22</sup> The manifest purpose of this provision is to enable the INS to ascertain whether an individual is a lawfully registered alien. See *United States v. Campos-Serrano*, 404 U.S. 293, 299-300 (1971).

Moreover, in 8 U.S.C. 1357(a)(1), Congress has expressly empowered immigration officers "to inter-

<sup>22</sup> Violations of this provision are punishable by a fine of \$100 and 30 days' imprisonment.

rogate any alien or person believed to be an alien as to his right to be or to remain in the United States \* \* \*." Both this Court and the lower courts generally have understood Section 1357(a)(1) to cover questioning that is accompanied by a seizure within the meaning of the Fourth Amendment. See, *e.g.*, *United States v. Brignoni-Ponce*, *supra*; *Lee v. INS*, 590 F.2d 497, 500 (3d Cir. 1979); *United States v. Martinez*, 507 F.2d 58, 61 (10th Cir. 1974). By its terms, however, as the court of appeals itself acknowledged (Pet. App. 31a), Section 1357(a)(1) plainly does not require any suspicion of illegality as a prerequisite to such questioning. The statute thus manifests Congress' considered judgment that detentive questioning in the immigration context may be undertaken on the basis of a reasonable suspicion of alienage.<sup>23</sup>

Under this statutory scheme, therefore, Congress has conditioned each alien's privilege of residing or working in the United States on fulfillment of the obligation to carry at all times a registration card evidencing his right to be here. Aliens who choose to work or reside here accept that obligation and, by the same token, the obligation to produce proper documentation when requested to do so by INS officials pursuant to 8 U.S.C. 1357(a)(1). If they were free

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<sup>23</sup> Although the court of appeals was of the view that the Constitution does not permit any seizure of a person on the basis of alienage alone without a suspicion of illegality, the court did not expressly find Section 1357(a)(1) unconstitutional. Rather, it held that the Fourth Amendment limited the applicability of Section 1357(a)(1) by requiring that INS agents who detain individuals for questioning about their immigration status pursuant to the statute must have a reasonable suspicion that each individual so detained is an alien illegally in this country. Pet. App. 30a-32a.

to refuse such a request, the requirement to carry identification would be rendered virtually meaningless.

Because an alien's status is pervasively regulated by the government, the detention of a suspected alien for purposes of inquiring into his immigration status is analogous to searches of pervasively regulated businesses, which may be undertaken without a warrant where necessary to carry out the legitimate regulatory goals of the statute. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 599-600 (1981); *United States v. Biswell*, 406 U.S. 311, 316 (1972). This Court has explained that "when an entrepreneur embarks upon such a pervasively regulated business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). Similarly, an alien who has chosen to reside and work in the United States "accept[s] the burdens as well as the benefits of [his status]" and "in effect consents to the restrictions placed upon him." *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973).<sup>24</sup> In short, it is reasonable under the Fourth Amendment for an INS agent briefly to detain an individual reasonably suspected of being an alien so long as the detention is limited to inquiring as to the alien's right to be present in the United States.<sup>25</sup>

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<sup>24</sup> In *Almeida-Sanchez* this Court limited on constitutional grounds the authority to search granted by Section 1357. That decision, however, in no way affected the INS's authority to interrogate conferred by Section 1357(a)(1).

<sup>25</sup> As previously noted (see note 7, *supra*), the INS has a policy of instructing its agents not to detain individuals for questioning except on a reasonable suspicion of illegal alienage. This policy reflects a recognition of the INS's manpower limitations and an attempt to formulate a

In requiring a suspicion of illegal alienage, the court of appeals reasoned (Pet. App. 31a) that "[a]n alien \* \* \* may be in this country in total compliance with the immigration laws" and that "innocent citizens and aliens legally employed at surveyed factories enjoy the same right to be free of the indignity of arbitrary government intrusions which the Fourth Amendment guarantees all individuals." But it is not "arbitrary" to stop and question a person reasonably suspected of being an alien as to whether he is carrying with him the proper alien registration documents required by law. In the context of factory surveys, so long as there are reasonable grounds to believe that a significant number of employees are illegal aliens, INS agents presumably could avoid any charge of arbitrariness by stopping and interrogating *all* employees in a given factory concerning their right to be in this country. See pages 40-43, *infra*. Such an approach would appear to satisfy the Fourth Amendment's standard of reasonableness by avoiding the possibility that individuals might be seized for questioning solely as the result of an unconstrained exercise of discretion by the officer in the field. Cf. *Delaware v. Prouse*, *supra*, 440 U.S. at 663; *United States v. Villamonte-Marquez*, *supra*, slip op. 9-10. In our view, it is equally reasonable and nonarbitrary

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uniform nationwide policy that comports with the Seventh Circuit's decision in *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (1977) (en banc). See also *Lee v. INS*, *supra*; *Au Yi Lau v. INS*, 445 F.2d 217, 222-223 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971). Contrary to the court of appeals' assertion (Pet. App. 20a n.12), the policy does not constitute a "concession" that brief questioning of an alien amounting to a seizure within the meaning of the Fourth Amendment is prohibited in the absence of a suspicion of illegality. Cf. *United States v. Caceres*, 440 U.S. 741 (1979).

for agents to stop and question employees selectively, so long as the stop is based on objective, articulable facts giving rise to a reasonable suspicion of alienage. Thus, at least in the context of a minimally intrusive procedure such a factory survey, the Fourth Amendment permits INS agents to detain an individual for questioning on the basis of alienage, even in the absence of a suspicion of illegal alienage.<sup>26</sup>

**2. *The Fourth Amendment Does Not Require Individualized Suspicion for the Detention of Employees for Questioning During a Factory Survey if the Detention is Supported by a Reasonable Suspicion That a Substantial Number of the Employees are Illegal Aliens***

Even if the court of appeals were correct in concluding that detentions of employees for questioning during factory surveys must be based on a reasonable suspicion of illegal alienage, its holding that the required suspicion of illegality must be individualized is erroneous. Under the decision below, INS agents' reasonable suspicion (or even probable cause to believe) that numerous factory employees are illegal aliens does not justify the seizure of any particular employee. This holding creates a new Fourth Amend-

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<sup>26</sup> In our view, the context of the detention is an important factor in determining its reasonableness. For instance, requesting to see an alien's papers while he is standing at his work station is less intrusive than stopping an alien in his car while he is traveling along a highway. For this reason, the Court's holding in *Brignoni-Ponce*, that Border Patrol officers may stop a vehicle only on the basis of a reasonable suspicion that the vehicle contains illegal aliens, is not controlling in the very different situation presented by this case. Cf. *United States v. Villamonte-Marquez*, *supra*, slip op. 9-10, where the Court refused to apply the standards governing roving patrol stops of automobiles to stops of vessels on inland waters providing ready access to the open sea.

ment requirement that will make it quite difficult for the INS to act on reliable information concerning concentrations of illegal aliens. As this Court stated in *Martinez-Fuerte*, 428 U.S. at 561, however, "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion."

Obviously, when an officer's suspicions focus on a single individual, detention of that individual must be based on reason to suspect that he may be engaged in illegal activity. But there is no reason why, in other contexts, the basis for suspicion must be "individualized." Thus, for example, if an officer knows that seven out of ten persons are illegal aliens, the knowledge that three of the persons will turn out to be innocent does not alter the fact that, in the absence of any additional information dispelling the suspicion with respect to a particular individual, the officer has a reasonable suspicion of illegal alienage (indeed, probable cause) with respect to each person sufficient to justify an initial detention for purposes of inquiry.<sup>27</sup>

Often a search or seizure will momentarily invade the privacy of persons who are not individually suspected of being in violation of the law. For instance, in the administrative search context, a warrant for an "area inspection" need not be based on specific evidence of an existing violation, but may rest instead on a showing that "'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Marshall v. Barlow's, Inc.*, *supra*,

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<sup>27</sup> Of course, the reasonable suspicion standard recognizes that in most cases further inquiry will dispel the suspicion. Thus, as long as it is supported by reasonable suspicion at the time, a detention is consistent with the Fourth Amend-



436 U.S. at 320, quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967). Similarly, Customs officers may board a vessel to examine the vessel's manifest and papers without suspecting any unlawful conduct. *United States v. Villamonte-Marquez*, *supra*. In the immigration context, the right to stop a car at a fixed checkpoint does not rest on any individualized basis for suspicion of a particular car. See *Martinez-Fuerte*, 428 U.S. at 560-563. By the same token, Border Patrol officers may conduct a roving patrol stop where they have reason to suspect that at least one of the occupants of a car is an illegal alien or is engaged in criminal activity. See *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 884. Although the stop necessarily will effect an intrusion on all occupants of the car, the agents need not possess reasonable suspicion with respect to every occupant.

The Third Circuit has correctly rejected the notion that a particularized suspicion is necessary for a detention of employees during a factory survey. *Babula v. INS*, 665 F.2d 293 (1981). In *Babula*, INS agents had received a tip that a factory was employing illegal aliens from Poland. After corroborating the tip, the agents decided to conduct a factory survey (which is described in the court's opinion as an "area control operation"). The agents briefly questioned every individual in the factory, even though "the agents had observed nothing specifically about each person questioned, but rather based their suspicion on the milieu in which the workers were found." *Id.* at 296. The court of appeals held that "the tip from a reliable source about the employment of illegal Polish aliens, combined with indicia

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ment even though the suspicion later turns out to be unconfirmed.

that [the factory] did employ Polish aliens, [was] sufficient to justify the minimally intrusive questioning that the agents conducted." *Ibid.*<sup>28</sup>

A requirement of individualized suspicion of illegal alienage would make enforcement of the immigration laws in the work place virtually impossible. As in the instant case, the INS routinely receives information that a particular factory employs large numbers of illegal aliens, but rarely does it receive names and descriptions of the individual aliens. Nor is it likely that the INS will have reasonable suspicion that *every* employee is an illegal alien. Hence, if the Fourth Amendment requires particularized suspicion, surveys of factories for illegal aliens will never be conducted.

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<sup>28</sup> In so holding, the *Babula* court relied in part on the fact that every employee in the factory was questioned, and therefore the INS agents did not exercise "unconstrained discretion" in selecting whom to interview. 665 F.2d at 296-297. Although this Court has suggested that a particular law enforcement practice is more likely to comport with the Fourth Amendment's reasonableness requirement if it involves a minimal amount of discretion on the part of the officer in the field, it is not essential that every permissible law enforcement practice be devoid of all discretion. For example, at a traffic checkpoint, INS agents may selectively refer only some of the cars to a secondary inspection station for questioning, without a reasonable suspicion as to the individual car. *Martinez-Fuerte*, 428 U.S. at 563-564. Indeed, "[l]ess than 1% of the motorists passing the checkpoint are stopped for questioning." *Id.* at 563 n.16. In contrast, far less discretion is exercised during a factory survey, where INS agents question with regard to citizenship status on the basis of a reasonable suspicion of alienage. See note 7, *supra*. The showing of reasonable and particularized suspicion underlying the selection of particular individuals for detention and questioning constitutes an equivalent and effective curb on arbitrary official behavior.

In sum, the court of appeals has unjustifiably struck down reasonable and minimally intrusive procedures that are exceptionally valuable to the conduct of the INS's mission. Its decision should be reversed.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE

*Solicitor General*

STEPHEN S. TROTT

*Assistant Attorney General*

ANDREW L. FREY

*Deputy Solicitor General*

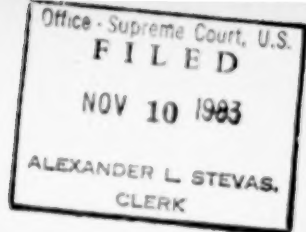
ELLIOTT SCHULDER

*Assistant to the Solicitor General*

PATTY MERKAMP STEMLER

*Attorney*

AUGUST 1983



No. 82-1271  
IN THE  
**Supreme Court of the United States**

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October Term, 1983

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IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,  
*Petitioners,*

*vs.*

HERMAN DELGADO, *et al.*,  
*Respondents.*

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**BRIEF FOR THE RESPONDENTS.**

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HENRY R. FENTON,  
*(Counsel of Record),*  
GORDON K. HUBEL,  
LEVY AND GOLDMAN,  
3550 Wilshire Boulevard,  
Suite 1020,  
Los Angeles, Calif. 90010,  
(213) 380-3140,  
MAX ZIMNY,  
1710 Broadway,  
New York, NY 10019,  
(212) 265-7000,  
*Attorneys for Respondents.*

**Questions Presented.**

1. Whether INS agents violate the Fourth Amendment when, without cause to suspect any particular individual employed in a workplace of being an illegal alien, they enter the workplace in numbers and without warning and conduct a "survey" by stationing armed agents wearing badges at the workplace exits, handcuffing and arresting those workers who attempt to leave in plain sight of the rest of the workplace, and methodically detaining and questioning the workforce for one to two hours.
2. Whether INS agents violate the Fifth Amendment by discriminating against Hispanic workers in carrying out workplace surveys.

# TABLE OF CONTENTS

	Page
Questions Presented .....	i
Constitutional Provision and Statute Involved .....	1
Statement .....	1
Summary of Argument .....	12
Argument .....	15

## I.

INS Workplace Surveys Violate the Fourth Amendment by Seizing All Workers in the Workplace Without a Particularized and Objective Basis for Suspecting Any of Them of Illegal Alienage .....	15
A. During the Course of INS Factory Surveys, Workers Are "Seized" Within the Meaning of the Fourth Amendment .....	15
B. Persons Subjected to INS Workplace Surveys Are Unreasonably Seized .....	20
1. INS Surveys are Violative Per Se of the Fourth Amendment .....	20
2. Previous Decisions of This Court Demonstrate That INS Surveys Constitute Unreasonable Seizures .....	22
3. INS Surveys Do Not Further National Immigration Policy Objectives .....	26
C. The Fourth Amendment Requires That INS Agents Have a Particularized and Objective Suspicion of Illegal Alienage in Order to Detain Any Person for Questioning .....	31
1. INS Agents Must Have a Suspicion of Illegal Alienage in Order to Detain Any Workers for Questioning in Workplace Surveys .....	31
2. INS Agents Must Have a Particularized Suspicion That Each Person Detained for Questioning in a Workplace Survey Is an Illegal Alien .....	38

II.

INS Workplace Surveys Discriminate Against Persons of Latin Ancestry in Violation of the Fifth Amendment .....	42
Conclusion .....	43



## TABLE OF AUTHORITIES

Cases	Page
Almeida-Sanchez v. United States, 413 U.S. 266 (1973) .....	24, 25, 26, 36, 37, 40
Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir. 1971), cert. denied 404 U.S. 864 (1971) .....	36, 41
Babula v. INS, 665 F.2d 293 (3rd Cir. 1981) .....	16, 19, 41, 42
Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) .....	16
Brown v. Texas, 443 U.S. 47 (1979) .....	39
Carpenter v. Hall, 311 F.Supp. 1099 (D.C. Texas 1970) .....	19
Carroll v. United States, 267 U.S. 132 (1925) .....	37
Chambers v. Maroney, 399 U.S. 42 (1970) .....	26
Colonade Corp. v. United States, 397 U.S. 72 (1970) .....	40
Dunaway v. New York, 442 U.S. 200 (1979) .....	22
Florida v. Royer, 103 S.Ct. 1319 (1983).....	15, 16, 18, 22, 32
G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) .....	40
Green v. United States, 259 F.2d 80 (D.C. Cir. 1958), cert. denied 359 U.S. 907 (1959) .....	35
Illinois Migrant Council v. Pilliod, 398 F.Supp. 882 (N.D. Ill. 1975) aff'd 540 F.2d 1062 (7th Cir. 1976), modified as to remedy, 548 F.2d 75 (7th Cir. 1977) .....	2, 36, 41
Illinois Migrant Council v. Pilliod, 531 F.Supp. 1011 (N.D. Ill. 1982) .....	16
International Ladies' Garment Workers Union v. Sureck, 681 F.2d 624 .....	3, 6, 9, 15, 17, 18, 25, 36, 38, 41
James v. Ball, 613 F.2d 180 (9th Cir. 1979) .....	9
LaDuke v. Nelson, 560 F.Supp. 158 (E.D. Wash. 1982 .....	2, 41
Lee v. INS, 590 F.2d 497 (3rd Cir. 1979) .....	41

	Page
Marquez v. Kiley, 436 F.Supp. 100, 436 F.Supp. 100, 436 F.Supp. 100 (S.D. N.Y. 1977) .....	2, 41
Marshall v. Barkow's, Inc., 436 U.S. 307 (1978) .....	26, 33, 37, 40
Mercy v. First Republic Corp. of America, 43 F.R.D. 465 (S.C. N.Y. 1968) .....	19
Michigan v. Summers, 452 U.S. 692 (1981) .....	32
Ojeda-Vinales v. INS, 523 F.2d 286 (2d Cir. 1975) .....	36, 41
Payton v. New York, 445 U.S. 573 (1980) .....	21
Plyler v. Doe, 457 U.S. 202 (1982) .....	27, 28, 29, 30, 34
Reid v. Georgia, 448 U.S. 438 (1980) .....	15, 17, 32
See v. Seattle, 387 U.S. 541 (1967) .....	16
Shulman v. Ritzenberg, 47 F.R.D. 202 (D. D.C. 1969) .....	19
Sibron v. New York, 392 U.S. 40 (1968) .....	39
Terry v. Ohio, 392 U.S. 1 (1968) .....	19, 23, 32
United States v. Barbera, 514 F.2d 294 (2d Cir. 1975) .....	24
United States v. Biswell, 406 U.S. 311 (1972) .....	40
United States v. Brignoni-Ponce, 422 U.S. 873 (1975) .....	23, 24, 25, 31, 32, 33, 34, 36, 39
United States v. Campos-Serrano, 430 F.2d 173 (7th Cir. 1970), affirmed 404 U.S. 293, cert. denied 404 U.S. 1023 .....	36
United States v. Cortez, 449 U.S. 411 (1981) .....	13, 14, 23, 24, 32, 39, 40
United States v. Grandi, 424 F.2d 399 (2d Cir. 1970) .....	35
United States v. Heredia-Castillo, 616 F.2d 1147 (9th Cir. 1980) .....	39, 40
United States v. Mallides, 473 F.2d 859 (9th Cir. 1973) .....	35, 43
United States v. Martinez-Fuerte, 428 U.S. 543 (1976) .....	24, 25, 26

	Page
United States v. Mendenhall, 446 U.S. 544 (1980) .....	15, 16, 17, 23
United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971) .....	17
United States v. Ortiz, 422 U.S. 81 (1975) .....	26
United States v. Place, 103 S.Ct. 2637 (1983) .....	22, 23
United States v. Villamonte-Marquez, 103 S.Ct. 2573 (1983) .....	26, 41
Ybarra v. Illinois, 44 U.S. 85 (1979) .....	39
Congressional Material	
Hearings on Oversight of the Immigration & Naturalization Service before the Subcommittee on Immigration, Citizenship & International Law of the House Committee on the Judiciary, 95th Cong. 2d Sess., p. 88 (1978) .....	27
Hearing on Undocumented Aliens, Feb. 24, 1978, before the Subcommittee of the Department of State, Justice & Commerce, the Judiciary, and Related Agencies Appropriations; U.S. House of Representatives, 95th Cong., 2d Sess. ....	25
House Report 97-116 to Immigration and Nationality Act Amendments of 1981, reprinted in 1981 U.S. Code Cong. and Admin. News, p. 2595 .....	37
"The Tarnished Golden Door, Civil Rights Issues in Immigration," U.S. Commission on Civil Rights, pp. 82, 84, 90-91, 94 (1980) .....	4, 6, 7, 29
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	Page
Constitution	
United States Constitution, Fourth Amendment .....	
..... i, 1, 12, 14, 15, 16, 20, 21, 22	
..... 23, 25, 26, 31, 33, 35, 37, 38, 39, 41, 42	
United States Constitution, Fifth Amendment .....	i, 42
Periodicals	
"Most Aliens Regain Jobs After Raids," Los Angeles Times, August 1982 .....	28
"Immigration Bill Dead This Year, O'Neill Says," Los An- geles Times, October 5, 1983 .....	28
"INS Chief Seeks Boost in Patrols," Los Angeles Times, October 7, 1983 .....	29
Rule	
Federal Rules of Civil Procedure, Rule 23(a)(4) .....	19
Statutes	
United States Code, Title 8, Sec. 1301 .....	37
United States Code, Title 8, Sec. 1304(a) .....	36
United States Code, Title 8, Sec. 1305 .....	14, 36
United States Code, Title 8, Sec. 1324(a) .....	28
United States Code, Title 8, Sec. 1357(a)(1) .....	14, 35, 36
United States Code, Title 19, Sec. 1581(a) .....	41
Textbooks	
Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L.Rev. 349, 366, 411, 421 (1974) .....	21, 38
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	Page
Lasson, N., The History and Development of the Fourth Amendment to the United States Constitution (reprinted in 1970) pp. 51-53 .....	21
LeFave, Search & Seizure, Ch. 9, Supp. p. 23 (1983) .....	19
Note, Developments-Aliens, 96 Harv. L.Rev. 1286, 1439-1440, 1441 (1983) .....	28
Warren & Passel, Estimates of Illegal Aliens from Mexico Counted in the 1980 United States Census (1983) .....	35

No. 82-1271

IN THE

# Supreme Court of the United States

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October Term, 1983

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IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,

*Petitioners,*

vs.

HERMAN DELGADO, *et al.*,

*Respondents.*

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## BRIEF FOR THE RESPONDENTS.

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### **Constitutional Provision and Statute Involved.**

Petitioners' Brief contains a correct recitation of the Fourth Amendment and the statute involved.

### **Statement.**

This case concerns the constitutionality of an immigration enforcement program embarked upon by the INS and designed to apprehend large numbers of undocumented workers in the interior of the United States. In contrast to other INS immigration enforcement techniques which have come before this Court and which are designed to apprehend and deport foreign nationals who have unlawfully crossed our borders, the program of "factory surveys" that is at issue in this case has nothing to do with border enforcement. On the contrary, the stated purpose of the national program of workplace surveys is to apprehend those undocumented workers who have assimilated themselves into the general population of the United States. Thus, for the most part,

the surveys are carried out in the industrial areas of our large urban centers.<sup>1</sup>

1. The surveys themselves are unprecedented in the annals of American jurisprudence because of their systematic and widespread violation of civil rights. Although the INS arrested 78 undocumented workers from among 300 employees in the first Davis Pleating survey in January 1977 and 39 out of 200 employees in the second survey (J.A. 51), approximately 75% of the employees in the first survey and 80% in the second survey were citizens of the United States or legal resident aliens. Hence, if the INS arrested 20,000 undocumented workers in factory surveys in a single year in Los Angeles alone as Petitioners claim, it may be inferred that in excess of 100,000 entirely innocent people were detained at the price of apprehending those 20,000 undocumented workers.

In order to carry out the objective of "surveying" workers in their workplaces, the INS utilizes a method of operations which is designed to permit methodical interrogation of the entire workforce. In this way the workplace is effectively transformed into a police interrogation chamber. As the INS concedes, the factory surveys at Davis Pleating and Mr. Pleat were carried out as part of a nationwide program. The characteristics of the surveys are as follows.

When the INS receives a complaint that illegal aliens are employed at a particular company, whether that complaint comes in the form of an anonymous tip over the telephone or in some other form, the company in question is contacted by an INS investigator who requests permission of the employer to conduct an INS workplace survey at some future unspecified date. J.A.

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<sup>1</sup>To carry out "area control," the INS also conducts surveys in urban residential areas and in agricultural areas of this country. *Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882 (N.D. Ill. 1975), *aff'd*, 540 F.2d 1062 (7th Cir. 1976), *modified as to remedy*, 548 F.2d 75 (7th Cir. 1977) (*en banc*); *Marquez v. Kiley*, 436 F.Supp. 100, 436 F.Supp. 100 (S.D. N.Y. 1977); *LaDuke v. Nelson*, 560 F.Supp. 158 (E.D. Wash. 1982).



47; Gilbert Clarin Dep. pp. 67-68; Howard Dodds Dep. pp. 36-37. Ninety percent of the companies that are contacted in this manner permit the INS to carry out a survey at their premises.<sup>2</sup>

The selection of which workplaces to survey on any given day is made randomly by the INS. Fred Englert Dep. p. 53. Further, the determination of survey dates and times is not made in advance but rather workplaces to be surveyed are selected on the day of the survey. Walters Dep. p. 16; Rice Dep. p. 9. Thus it is impossible for employers to forewarn employees of the date of an impending survey.

Since ninety percent of the surveys take place after employer acquiescence to an INS request for permission, those surveys occur without any review by a neutral magistrate of cause for the survey and the mass detentions that occur in the course of the survey. Even in the small minority of cases where warrants are obtained, those warrants are general search warrants that the INS has conceded only authorize entry into the workplace but not the detention of the workers inside. *International Ladies' Garment Workers Union v. Sureck*, 681 F.2d 624, 629, n. 8.<sup>3</sup>

A large force of INS agents, usually 20 to 30 investigators, work together as a team to carry out the survey. J.A. 47, 149; Claren Dep. p. 81. The workplace is surrounded by INS officers,

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<sup>2</sup>The consent that is obtained from employers for workplace surveys is uninformed since they are asked only to agree to permit "a team of investigators come down and interview your employees," without any explanation by the INS of standard survey procedure such as the sealing of entrances and exits. Kee Dep. p. 29.

<sup>3</sup>When warrants are obtained, they are totally lacking in specificity. Thus, the Davis Pleating warrants described the objects of the warrants as "concealed . . . property; namely persons, namely illegal aliens . . ." and contained neither names nor descriptions of individuals (C.R. 10, Ex. A). As Petitioners explain in their opening brief, specific warrants are unknown to the INS survey teams since the INS agents know neither the names nor have descriptions of any suspected illegal aliens before carrying out surveys. The purpose of the surveys is to uncover such individual suspects.

some of whom are stationed outside, while others stand guard inside all the exits and entrances "in order to guarantee that individuals will not escape."<sup>4</sup> J.A. 48. Marked INS vans are stationed outside the exits and entrances. Dodds Dep. pp. 63, 68. Although the INS agents do not wear uniforms, they carry very visible indicia of police authority on their persons. They all wear badges, they are armed, they carry and display handcuffs (J.A. 134; Smith Dep. p. 109), they carry regulation flashlights (Rice Dep. p. 8), which they are trained to use as batons, and most of them carry unconcealed walkie-talkies. (J.A. 83, 92); Smith Dep. pp. 109, 111; Clarin Dep. p. 109; Rice Dep. p. 8.

The workers who are subjected to a survey reasonably infer that they are not free to leave from their encirclement by INS agents.<sup>5</sup> As the INS agents enter the factory, there are typically cries of "la migra" (the immigration) and individual workers attempt to flee or hide. J.A. 53. Any doubt that may exist in the minds of the workers about whether or not they are free to leave is eliminated when those who attempt to flee through doorways or to hide are physically prevented from doing so or are appre-

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<sup>4</sup>As the United States Civil Rights Commission found in its study of workplace surveys:

"typically, entrances and exits to the place to be searched are blocked, . . . INS factory raids, then, are carefully planned to ensure that all employees are forced to remain on the premises or are restrained from leaving." *The Tarnished Golden Door, Civil Rights Issues in Immigration*, p. 82 (1980).

Moreover, INS investigators testified that the exits and entrances were blocked to keep anyone from leaving during the surveys. Supervisory Investigator Walters Dep. p. 33; Investigator Rice Dep. p. 11; J.A. 158.

<sup>5</sup>As plaintiff Maria Miramontes testified:

"that's the first thing anybody thinks standing by the door. It's normal for anybody to think to keep people from leaving." J.A. p. 126.

Similarly, plaintiff Labonte inferred that the INS investigators stationed in the doorways "were blocking everybody inside." J.A. p. 146.

hended and handcuffed before the eyes of their fellow workers.<sup>6</sup> Walters. Dep. p. 49; Kee Dep. pp. 77-79.

Once inside the factory, most of the INS officers form a line across one side of the building. As Investigator Kee described, the September 1977 Davis Pleating survey, when all 16 officers were in the line, they proceeded systematically down the rows of workers seated at their work stations, questioning them as they went. Kee Dep. pp. 64-65. Simultaneously, other officers pursued the workers who attempted to flee or hide. Kee Dep. pp. 77-79.<sup>7</sup>

The INS sometimes obtains the assistance of local police departments in carrying out workplace surveys, as in the September 1977 Davis Pleating survey, where uninformed police officers assisted the INS agents in the factory. J.A. 92, 109.

INS surveys are characterized by a substantial show of force. Thus, non-Hispanic Davis Pleating employee Georgia Wren observed men who were handcuffed and who were treated roughly, "particularly in the way in which handcuffs were put on them . . ." J.A. 78. Similarly, plaintiff Delgado saw employees being handcuffed (J.A. 88, 97) and plaintiff Labonte saw men who were handcuffed in pairs (J.A. 140) being roughly treated by INS officers. J.A. 142.

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<sup>6</sup>App. A, 19a. For example, at Davis Pleating, Delgado saw five people trying to leave through a back exit who were stopped by an INS officer. J.A. p. 82. At Mr. Pleat, Miramontes observed a man attempting to depart after being told to "stay inside" by an INS officer, push the INS agent aside and run out the door. J.A. p. 126.

<sup>7</sup>Assistant District Director Smith reports that:

"a great amount of time and a large number of officers were required to locate persons who either ran from Immigration officers or who concealed themselves"

in the 1977 Davis Pleating surveys. J.A. p. 49.

The results of the surveys in the workplace is utter chaos and pandemonium among the workers.<sup>8</sup> Although workers characteristically remain at their work stations, after it becomes apparent to them that they have become a "captive workforce," (*ILGWU v. Sureck*, 681 F.2d at 632), most workers are too traumatized to work and work comes to a halt during the entirety of the survey.<sup>9</sup>

Before the questioning begins, there is no general announcement to the workforce by the INS survey team. Walters Dep. p. 35. As the workers are questioned individually, however, the INS agents identify themselves as Immigration officers and then immediately proceed to ask questions about alienage. *E.g.*, Kee Dep. p. 65. It is INS policy to question virtually all persons employed by a company when any survey is carried out. J.A. 49. In most instances, the object of the questioning is to determine

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<sup>8</sup>As the United States Civil Rights Commission determined:

"Testimony received by the Commission indicates that INS area control operations do cause confusion and pandemonium among all factory employees, thereby disrupting the factory's operations and decreasing production." *The Tarnished Golden Door, Civil Rights Issues in Immigration*, pp. 90-91 (1980).

<sup>9</sup>Plaintiff Delgado, a Davis Pleating supervisor, observed that "the whole factory was put to a stop; standing still." J.A. p. 89. Ramona Correa, also a Davis Pleating supervisor, confirmed that the employees couldn't work. When asked how long she spent calming down employees, she testified:

"Maybe a half-hour, forty-five minutes because it was a matter of talking to them. 'Come on, relax. It's o.k. They're going away. They're not here anymore. Just forget it.' *So I had to calm them down, because some were crying. They didn't take them. They didn't do anything but ask them questions, but they were still crying.*" J.A. p. 107.

Plaintiff Miramontes, employed at Mr. Pleat, testified that the employees in the factory who were not arrested were nervous for days after the survey. J.A. p. 130.

the immigration status of the workers who are questioned.<sup>10</sup>

INS survey teams often interrogate, but not always, all employees in the workplace about their immigration status.<sup>11</sup> Although Petitioners assert in their brief that investigators question only persons suspected to be aliens, the evidence and admissions of the INS showed clearly that persons are questioned about their citizenship, even if they are not suspected of being aliens. J.A. 55, 152, 154-156.

When INS survey teams selectively question workers, persons are selected for questioning largely as a result of Hispanic ethnic appearance. Agents select persons for questioning based upon clothing, personal grooming; but principally upon whether the worker appears to be of Latin origin.<sup>12</sup> The clothing and other

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<sup>10</sup>As Assistant INS District Director Phillip Smith declared:

"Immigration officers during the survey usually speak to virtually all persons employed by a company to either ascertain a person's immigration status or to seek information from that person. . . .

When surveys are conducted reasonable questions as to a person's identity and nationality are asked. . . ." J.A. p. 49.

<sup>11</sup>Thus investigators Richard Rice and Carlos Tellez, Jr., testified that INS agents were instructed to, and did in fact, ask all employees questions about their citizenship during surveys. J.A. pp. 152, 154-156. Other investigators testified that they did not question everyone. *E.g.*, Clarin Dep. p. 104; Kee Dep. p. 66.

As the United States Civil Rights Commission found:

"INS officers in some jurisdictions interrogate all persons in the area targeted for control; others select some persons for interrogation based on ethnicity alone; and still others make selections based on a combination of factors." *The Tarnished Golden Door: Civil Rights Issues in Immigration*, U.S. Commission on Civil Rights, p. 84 (1980).

<sup>12</sup>As emphasized by Assistant INS Regional Director Smith, the primary focus in deciding whom to question is upon "Latin American appearance," consisting of dark hair, brown eyes and dark skin. Smith Dep. pp. 168-169. In selecting persons for questioning, investigators also rely upon varying and subjective concepts of "foreign" appearance (footnote continued on following page)

appearance factors ostensibly relied upon for questioning on their face, however, are stereotyped and unrealistic, or excessively vague. Moreover, investigators rely upon their own subjective notions of what might be considered foreign manner of dress or appearance since they are given no guidance or instruction about what to look for.<sup>13</sup>

Although INS agents have varying ideas about what constitutes "foreign manner of dress or grooming," they uniformly adhere to INS policy to select workers for questioning in workplace surveys upon the basis of "ethnic, physical appearance."<sup>14</sup> J.A. 37. Since the other factors INS agents rely upon in determining whom to question are so vague and so slanted toward those of Hispanic origin,<sup>15</sup> the only real factor that emerges is whether the "suspect" appears to be Latin.

In the surveys that took place at Davis Pleating in 1977, only Hispanic workers were questioned while Caucasians, Blacks and

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including clothing such as sombreros (Clarín Dep. pp. 75-78; Smith Dep. p. 170), pointed or scuffed shoes (Clarín Dep. pp. 75-78; Dodds Dep. p. 81), flowery blouses (Clarín Dep. pp. 75-78) and huaraches [Mexican sandals] (Smith Dep. p. 171; Walters Dep. p. 42). Some investigators look for loose clothing (Walters Dep. p. 34) or clothing combinations that clash (Brechtel Dep. pp. 29-30), while others select on the basis of narrow pants (Clarín Dep. pp. 75-78) or new shoes (Walters Dep. p. 42). In personal grooming, some agents look for greasy hair or hair that has not been blown dry or fashionably styled. Dodds Dep. p. 81; Brechtel Dep. pp. 29-30.

<sup>13</sup>Dodd Dep. p. 82; Walters Dep. p. 43; Smith Dep. p. 131.

<sup>14</sup>E.g., Smith Dep. pp. 168-169; Patrick Walters Dep. p. 43; John Brechtel Dep. pp. 17, 29; Carlos Tellez Dep. pp. 7-8, 20.

<sup>15</sup>INS written policy provides that suspicion of alienage or illegal alienage must be based on ethnic physical appearance, foreign manner of dress or grooming, apparent inability to speak English, the person's "excessive nervousness or studied nonchalance," a specific tip from a reliable informant or the officer's knowledge of a high concentration of aliens in the area. J.A. 37-38.

The final two factors may be relied upon by the INS as reasons to conduct a survey but are not relied upon to select persons for questioning. Nervousness or nonchalance alone would hardly exclude anyone from questioning; hence, to the extent that distinctions are made among workers for questioning, they are based upon ethnic appearance.

Oriental workers were skipped over. J.A. 86, 96-97, 147. At Mr. Pleat, virtually everyone was questioned but the Black workers. J.A. 42. The surveys at Davis Pleating and Mr. Pleat took approximately one and one-half hours in duration, falling within the typical one-to-two-hour range for such surveys. J.A. 48, 50, 53-54, 127.

2. The underlying lawsuits in this case were consolidated actions for declaratory and injunctive relief challenging the constitutionality of the INS workplace surveys under the Fourth and Fifth Amendments. Those actions were brought by the individual Respondents and by the International Ladies' Garment Workers Union (ILGWU) on behalf of a class consisting of all persons of Latin ancestry employed in the garment industry, or any other industry, in the Central District of California.

The District Court denied Respondents' motion to certify the class and dismissed the ILGWU as a party for lack of standing. On appeal, the Ninth Circuit never reached the question of the dismissal of the ILGWU on the basis that its holdings "will nevertheless inure to the benefit of the ILGWU." The Court of Appeals held, further, that the District Court did not abuse its discretion in denying class certification, relying upon *James v. Ball*, 613 F.2d 180, 186 (9th Cir. 1979), and the cases cited therein. 681 F.2d at 645, n. 24.

3. Respondent Herman Delgado, a United States citizen, was born in Puerto Rico in 1942 and has lived continuously in the continental United States since 1953. He completed the tenth grade in high school in New York City and received his high school equivalency diploma when he served in the United States Navy from 1960-1966. He has been living in Southern California since 1966. J.A. 79-80

During the second Davis Pleating survey, Delgado, a supervisory employee, was sitting at his desk speaking to another supervisor in English when both men were approached by two INS agents. One of them asked Delgado two questions about his birthplace and after Delgado responded that he was born in Mayaguez, Puerto Rico, the agent, within deliberate earshot of Del-



gado and the other employee, stated to his partner that it would be necessary to come back to Davis Pleating and check these employees out more thoroughly because their English was too good. J.A. 93-94.<sup>16</sup>

Respondent Ramona Correa, a United States citizen, is the same age as Herman Delgado and was born in a suburb of Los Angeles. She has been employed at Davis Pleating for over twenty years and was working as a supervisory employee during the INS surveys. J.A. 100. Correa avoided being questioned in the first survey, perhaps because she interpreted for INS agents. Correa Dep. 46. She was questioned about her place of birth, however, in the second survey.<sup>17</sup> J.A. 115.

Both Correa and Delgado walked to various locations in the factory during the surveys to calm down the workers. J.A. 86, 197.

Respondent Marie Miramontes was a supervisory employee at Mr. Pleat during the INS survey of October 1977. She has worked for Mr. Pleat for more than twenty years. J.A. 117. Although a permanent resident alien, Mrs. Miramontes came to the United States as a child in 1944 and attended and graduated from Roosevelt High School in Los Angeles. J.A. 128. During the Mr.

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<sup>16</sup>During the second Davis Pleating survey, Delgado asked the owner to ask the INS agents to move a van that was blocking the loading dock. Although Delgado testified that he looked through the loading dock door and saw INS buses loading workers who were apprehended, it is not clear whether he personally stepped outside to load the truck. He testified, "I started loading the truck, giving orders to load the truck, because they moved the van and my truck came in. We started loading the truck." J.A. 98.

<sup>17</sup>Petitioners assert that Correa testified that, as a U.S. citizen, she had nothing to fear from the surveys. In fact, she testified precisely to the contrary. Although U.S. citizens and permanent resident aliens objectively have no reason to fear problems in connection with their immigration status, said Correa, the surveys create an atmosphere of fear and intimidation that is frightening and upsetting to U.S. citizens and legal resident aliens. Correa Dep. 76.

Pleat Survey, Mrs. Miramontes was questioned by INS agents about her citizenship. When she responded that she was a permanent resident, she was asked to produce her papers.<sup>18</sup> J.A. 120-121. Mrs. Miramontes testified that she felt compelled to cooperate with the questioning of the INS agents because of the badges that they were wearing. J.A. 121. Although she wanted to leave the factory during the survey, she believed that she was required to remain on the premises because of the INS show of force that she observed going on around her. J.A. 126-127.<sup>19</sup>

Respondent Francisca Labonte, a permanent legal resident, has been residing in the United States since 1962 and has been employed by Davis Pleating since 1964. Labonte Dep. 5-6. Labonte was on layoff during the January 1977 survey but had returned to work in September 1977, and was questioned by INS agents during that survey. Labonte Dep. 15. As Mrs. Labonte was sitting at her machine, she was tapped on her shoulder by an INS agent who stood by her chair and asked her for her papers. J.A. 139.<sup>20</sup>

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<sup>18</sup>Mrs. Miramontes underwent some trying moments as she looked for her immigration documents. Fortunately, she found them but had forgotten them, as she sometimes did when she changed purses, she would have been subject to arrest. J.A. 120-121.

<sup>19</sup>During the Mr. Pleat survey, Mrs. Miramontes overheard INS agents questioning an employee from the shipping department who identified himself as an American citizen. She observed INS agents handcuff the man, though he was subsequently released. Miramontes Dep. 27.

<sup>20</sup>Mrs. Labonte exited the factory, evidently after questioning of the workforce had already been completed. At that point, those persons who had been arrested had already been taken outside of the factory. She stepped out to observe the manner in which the workers who had been pushed and handcuffed were being treated. J.A. 137-138; 143-144. Mrs. Labonte walked only as far as the INS van that was parked outside the door and the INS agents who were in the process of loading the van with suspected undocumented workers. J.A. 136-137. Had Mrs. Labonte tried to leave, it is evident that she would have been stopped by INS agents. Thus an INS agent related an incident that occurred in another survey when a worker left the factory to get something out of his car. The agent followed the person and stood by and watched him to make sure that he would walk back to the factory. J.A. 158.

### Summary of Argument.

1. INS workplace surveys effectively seize all workers in the workplace even before any questioning is carried out. At the outset, exits are sealed and guards are stationed. Then, a large number of armed INS agents, wearing badges and equipped with handcuffs, walkie-talkies and police flashlights enter and carry out a synchronized sweep of the workplace, questioning the workers seated at their stations. The INS entry is generally marked by shouts from workers of "la migra" (the immigration) and the apprehension of workers who attempt to escape. By carrying out the surveys in the workplace, the INS creates the impression that workers who attempt to leave will be acting contrary to the wishes of their employer and thus jeopardizing their jobs. Thus, it is evident to all workers, even before questioning has begun, that any attempted departure would be futile. The surveys are typically an hour to two hours in duration, marked by a complete cessation of work amid an atmosphere of fear and confusion.

2. a. INS workplace surveys closely resemble the general searches and seizures carried out by the British which led to the enactment of the Fourth Amendment. They are carried out on the basis of a generalized suspicion that some illegal aliens might be in the workplace, but without any objective reason to suspect even a single individual. They are, therefore, unreasonable seizures, *per se*.

b. INS surveys are unreasonable seizures because the INS is unable to meet its burden of proving that it is necessary to detain all persons in the workplace for an hour to two hours, in order to ask most individuals one or two questions. Further, the surveys are far more intrusive than the brief public stop that is permitted under the exception to the requirement of probable cause for the investigation of a crime. That exception requires a reasonable and articulable suspicion that the person under investigation has committed or is about to commit a crime. Yet, the entire workforce is detained in a survey without reason to suspect any person of illegal alienage.

Petitioners contend that the need to enforce our immigration laws justifies detaining people without reason to suspect them of being illegal aliens. Previous decisions of this Court, however, have already rejected this notion. Moreover, INS surveys cannot be compared to stops at a permanent checkpoint because they are far more intrusive, far longer in duration and roving.

c. Workplace surveys, at best, represent an inefficient utilization of INS resources which could better be deployed at our borders. Because our laws permit the employment of illegal aliens, Mexican nationals and other aliens are drawn to this country by the jobs and other amenities our society makes available to them and by poor economic conditions in their countries of origin. Many of them have become permanent members of our community. Although Congress has failed to take the steps necessary to resolve our national immigration problem, the surveys do not contribute to the solution. Most illegal aliens apprehended in surveys merely return to their jobs within a short time. Those aliens contribute as much to our society as they obtain in social and other services and, for the most part, take jobs that Americans do not want.

In contrast to the minimal value of the surveys to our national interest, is the enormous damage that they do to the privacy rights of thousands of innocent and law abiding citizens and legal aliens.

3. a. This Court has held that persons may be stopped by INS agents for investigation of their immigration status only on the basis of a reasonable and articulable suspicion of illegal alienage. *United States v. Cortez*, 449 U.S. 411 (1981). Moreover, INS surveys are considerably more intrusive than roving patrol stops and serve a far lesser national interest. Thus, no lesser standard of detention for the surveys can be tolerated.

b. The alienage standard urged by the Petitioners would harm citizens who would be mistaken for aliens and would result in discrimination against Hispanic-Americans. Apart from dark skin and dark features, there is no objective criterion that INS agents can rely upon to attempt to differentiate aliens from citizens. Moreover, an alienage standard would effectively deprive the

five million aliens legally residing in the United States of all Fourth Amendment protection.

c. 8 U.S.C. 1357(a)(1), upon which Petitioners rely, cannot be construed to permit detentions on the basis of mere alienage since it must be construed in a manner consistent with the Fourth Amendment. The purposes of the alien registration requirements of our immigration laws are fully served by the statutory requirement that aliens register every change of address and a recent Congressional amendment to 8 U.S.C. § 1305, reflects an intention to regulate legal aliens less rather than more. Therefore, no legitimate government interest would be served by permitting aliens to be stopped at will by INS agents.

4. Petitioners make the circular argument that they should be excused from the particularity requirement of the Fourth Amendment because they have no particularized information upon which to base a suspicion of any individuals in the workplace before conducting a survey. The history of the Fourth Amendment teaches that it was precisely in order to guard against indiscriminate and arbitrary seizures of individuals that the particularity requirement was expressly inserted in the Fourth Amendment. Further, this Court in *United States v. Cortez, supra*, held that suspected illegal aliens may not be detained in the absence of a particularized basis of suspicion.

The line of cases involving administrative inspections is inapposite because businesses are known to be within the scope of regulation and the inspections are impersonal in nature. In contrast, workers detained in surveys are not known to be aliens, nor illegal aliens, and the intrusion is much greater and of a personal nature. Although administrative inspectors have very limited discretion, INS agents in surveys have complete discretion to detain anyone in the workplace without limitation.

5. INS surveys violate equal protection and, thus, the Fifth Amendment, because INS agents discriminate against persons of Hispanic origin in the questioning that takes place during the surveys.

## ARGUMENT.

### I.

#### INS WORKPLACE SURVEYS VIOLATE THE FOURTH AMENDMENT BY SEIZING ALL WORKERS IN THE WORKPLACE WITHOUT A PARTICULARIZED AND OBJECTIVE BASIS FOR SUSPECTING ANY OF THEM OF ILLEGAL ALIENAGE.

##### A. During the Course of INS Factory Surveys, Workers Are "Seized" Within the Meaning of the Fourth Amendment.

In *Florida v. Royer*, 103 S.Ct. 1319 (1983), this Court adopted the test contained in J. Stewart's plurality opinion in *United States v. Mendenhall*, 446 U.S. 544 (1980), to determine when government conduct constitutes a "seizure" under the Fourth Amendment. The issue is whether the show of official authority was such that a "reasonable person would have believed he was not free to leave." 446 U.S. at 554. Although Petitioners dispute that INS surveys result in seizures, the facts are overwhelmingly to the contrary.

Rather than just a brief seizure, INS factory surveys represent a very considerable intrusion upon the privacy of the many workers who are captured in the course of these surveys. As the Court of Appeals found, the surveys and the concomitant detention and coerced questioning of the workforces involved are far more intrusive than the minimal intrusions involved in *United States v. Mendenhall*, *supra*, and *Reid v. Georgia*, 448 U.S. 438 (1980), *ILGWU*, 681 F.2d at 633. In *Mendenhall*, the subject was approached in a public place by two agents who wore neither uniforms nor badges. She was merely asked to voluntarily show her identification and airline ticket. In contrast, workers subjected to surveys suffer a much greater invasion of privacy and are subjected to a significantly greater showing of official authority.

First, surveys are not staged in a public place where one might expect to be approached by a stranger, but rather in the individual's workplace, generally a factory. *Cf. Florida v. Royer*, 103 S.Ct. 1319, 1327 (1983). Employees who go to their workplaces reasonably anticipate that their privacy may be limited for legit-

imate business reasons by customers, other employees, or by others having a business reason for being present on the premises. When employees come to their workplaces, however, they do not reasonably anticipate that they will be confronted by law enforcement officers who will seal all exits and then approach them for questioning. Even when an employer permits INS agents entry, he cannot deprive his employees of their legitimate expectations of privacy against governmental intrusion. *Cf. Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 394 (1971). The Fourth Amendment guarantee of "the right of the people to be secure in their . . . houses," does not just refer to one's dwelling but extends also to one's place of work. *See v. Seattle*, 387 U.S. 541, 543 (1967). Respondents submit that police conduct which might amount to nothing more than mere questioning in a public place would cause a reasonable person to believe that he was not free to leave if it occurred at his place of work. *United States v. Mendenhall*, 446 U.S. 544, 554; *Florida v. Royer*, *supra*. In a public place, one can simply walk away from the officer who has approached and asked a question; at one's place of work, however, in addition to the show of authority implicit in the introduction of the officer and the initial questioning, is a feeling that one really cannot walk away from one's job.

Further, the location of INS surveys in the workplace suggests to the average worker that the encirclement of the workforce and the other actions taken by INS agents have been taken with the cooperation and approval of the employer. Thus, the average worker will fairly assume that any attempts to leave will be regarded as insubordination by the employer and result in termination. Hence, the location of the surveys in the workplace increases the coercive effect upon the workforce.

Secondly, the surveys typically entail the surrounding of the workplace by INS agents who are stationed in and around all doorways to prevent escape.<sup>21</sup> In addition to the physical presence

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<sup>21</sup>*Babula v. INS*, 665 F.2d 293 (3rd Cir. 1981); *Illinois Migrant Council v. Pilliod*, 531 F.Supp. 1011, 1018 (N.D. Ill. 1982).



of the agents themselves, are the INS vans which are placed outside the doorways. Workers who are captured in the surveys perceive that they have been encircled and that the exits to the workplace have been sealed. *ILGWU*, 681 F.2d at 630. This reasonably leads them to conclude that departure from the premises is not permissible. *Cf. U.S. v. Nicholas*, 448 F.2d 622 (8th Cir. 1971).

Third, in contrast to the mere approach of persons by one or two officers in a public place, the surveys are characterized by a massive show of police force. All of the agents, including the ones that were stationed in all doorways, wear badges and carry or wear handcuffs. Most of the agents in the Davis Pleating and Mr. Pleat surveys carried walkie-talkies, which the workers were able to see. J.A. 92, 118. Unlike the casual approach in the airport concourse found in *Mendenhall, supra*, and *Reid v. Georgia, supra*, in the Davis Pleating and Mr. Pleat surveys, a large number of agents suddenly entered the premises, blocked all doorways, and took immediate steps to begin systematic interrogation of the workers. Agents stationed themselves in a formation at one end of the factory and then simultaneously began walking down the lines of workers, questioning workers. Kee Dep. 64-65. The badges and other police equipment made their authority clear to the workers. Beyond that, the handcuffs, flashlights and walkie-talkies carried the message that the agents had come, not to engage in casual questioning of some workers, but to exercise force if necessary. The large number of INS agents involved, all of them visibly equipped with instruments of police force, and the complete coverage of the factory with agents walking down all of the aisles in para-military formation, reasonably suggested to the workers that the focus of the show of force and authority was on each and every one of them rather than on just a few suspected individuals. This impression was reinforced to the average person by the fact that the great majority of workers were questioned. Under the restraint of that show of police force and authority, only an extraordinary person would have attempted to depart from the factory during the surveys.

Fourth, the intimidating psychological effects of the initial INS entry into the factory and the sealing of the exits and entrances were intensified by the resultant screams of "la migra" (the immigration) and the desperate efforts of some workers to hide or run from INS agents.<sup>22</sup> Moreover, the workforce perceived at the outset that workers who attempted to flee to the exits were stopped or apprehended and handcuffed. *ILGWU*, 681 F.2d at 630, 633-634. In the survey at Mr. Pleat, a worker who told the questioning INS agent that he was a United States citizen was handcuffed, though later released, suggesting to those around him that one might be handcuffed or arrested for merely being disbelieved about one's citizenship. *Miramontes Dep.* p. 27.

Fifth, the employees in the surveyed factories were not told by the INS agents at any time during the surveys that they were free to leave. *Florida v. Royer, supra*, 102 S.Ct. at 1327. On the contrary, they could not have left if they had attempted to do so. *J.A.* 48; *Walters Dep.* 33.<sup>23</sup> Further, the purpose of the survey was never announced to the workers in the factory. *Walters Dep.* 35. Unless and until a particular worker had been approached by an INS agent for questioning or overheard the questioning of other workers, he could only make assumptions about the purpose of the police activity going on around him from what he observed. When it became the turn of a particular worker to be questioned, immediately after the officer identified himself as an Immigration Officer, he focused on the immigration status of the worker being questioned. *Kee Dep.* 65. This reinforced the perception of the average worker that the display of police force that was all around him in the factory was directed at him personally as a suspect

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<sup>22</sup>The beginning of the typical INS survey is characterized by such screams and by persons running to try and escape from the building. *J.A.* 53. It is curious that the INS disclaims responsibility for this aspect of the surveys since the INS depends upon these inevitable results of INS survey procedure for the disarming effect they have on the majority of the workforce.

<sup>23</sup>Employees who tried to leave at Mr. Pleat and Davis Pleating were stopped at the door by INS agents. *J.A.* 82, 126.

rather than simply as a witness. Since he was the subject of the questioning, it was evident that he was required to cooperate by answering the questions and by remaining on the premises as long as the INS agents remained present.<sup>24</sup>

Sixth, rather than the momentary investigative detention of *Terry v. Ohio*, 392 U.S. 1 (1968), persons involved in INS surveys are detained for one to two hours.<sup>25</sup> J.A. 48, 53-54, 127.

Petitioners appear to concede that illegal aliens involved in surveys reasonably feel that they are not free to leave but assert that U.S. citizens and legal residents have no reason to have similar feelings. This argument ignores the reality that the guarded doorways, the persons who are physically prevented from leaving, and the comprehensive display of authority make it clear to all workers that departure during the survey is prohibited. Moreover, it would be apparent to the average worker, U.S. citizen or otherwise, that any attempt to leave the premises while the survey is going on would be regarded as an indication of guilt. Cf. *Babula v. INS*, 665 F.2d 293, 298 (3rd Cir. 1981). As Respondent Marie Miramontes testified:<sup>26</sup>

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<sup>24</sup>LeFave, *Search & Seizure*, Ch. 9, Supp. p. 23 (1983).

<sup>25</sup>There is nothing in the record to support Petitioners' contention that workers who were detained in the course of the survey are free to leave after they answer questions. To the contrary, workers are not so informed and reasonably believe that they must remain present because of the continued display of INS force and authority. Agents remain stationed at the exits and entrances through the entirety of the survey, employees who attempt to escape or hide continue to be apprehended as they are encountered and the questioning continues in a systematic fashion until the survey is completed. Even if one were to accept Petitioners' unsupported contention that workers can leave after they are questioned, Petitioners apparently concede that they are not free to leave up to that point in time. Thus, certainly the workers who are questioned in the last half-hour of the survey, even under the Government's analysis, are detained far in excess of an hour.

<sup>26</sup>The Respondents, as would-be class representatives, under FRCP 23(a)(4), could have been expected to have been more courageous and assertive than the average worker. *Shulman v. Ritzberg*, 47 F.R.D. 202, 207 (D. D.C. 1969); *Carpenter v. Hall*, 311 F.Supp. 1099, 1114 (D.C. Texas 1970); *Mercy v. First Republic Corp. of America*, 43 F.R.D. 465, 470 (S.C. N.Y. 1968).

"Because if I leave and they think I don't have no papers and they shoot me or something. They see you leaving and they think I'm guilty." J.A. 127.

Contrary to Petitioners' contentions that persons with a lawful immigration status had nothing to fear in the surveys, Respondent Correa observed that U.S. citizens and lawful resident workers at Davis Pleating were immobilized by fear during the surveys, Correa Dep. p. 76, and INS agents made it clear to Respondent Herman Delgado, a United States citizen, that he could be arrested if he were disbelieved about his lawful immigration status. (J.A. 94). Indeed, a worker who identified himself as a U.S. citizen was handcuffed by INS during the Mr. Pleat survey, though later released. Miramontes Dep. 27.

Petitioners assert that the seizure of the workers is theoretical because the workers are free to go about their business, but the record demonstrates clearly that work came to a complete standstill as the workers were too much in shock and too frightened to perform any work. J.A. 89, 107, 130. Even after the INS agents left the factory, company supervisors were trying to calm down workers who were still crying. J.A. 107. Nervousness that was engendered by the surveys made it difficult for employees to go about their normal duties for days afterward. J.A. 130. Despite Petitioners' attempt to prove to the contrary, all workers subjected to INS workplace surveys are seized before any questioning has begun.

## **B. Persons Subjected to INS Workplace Surveys Are Unreasonably Seized.**

### **1. INS Surveys Are Violative *Per Se* of the Fourth Amendment.**

The very nature of INS workplace surveys renders them unreasonable under the Fourth Amendment. INS workplace surveys closely resemble the general searches and seizures carried out by British customs officers in our pre-revolutionary days. The British utilized writs of assistance that authorized the search of residential and commercial buildings and the apprehension of undescribed persons and the indiscriminate seizure of their papers and prop-

erty.<sup>27</sup> The use of these general search warrants was "the first in a chain of events which led directly and irresistibly to revolution and independence."<sup>28</sup> As this Court has written, the "indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 582 (1980). The INS workplace surveys possess the same indiscriminate quality as the writs of assistance that were employed by the British to tyrannize the American Colonists. Although no written warrant is involved in most INS workplace surveys, it would be ironic if the absence of a general warrant could immunize the evil that the second clause of the Fourth Amendment was clearly designed to prevent. The warrant clause of the Fourth Amendment implies that seizures must be regarded as unreasonable if they are of the general variety that the warrant clause of the Fourth Amendment clearly intended to forever invalidate.<sup>29</sup>

INS workplace surveys are the modern version of the pre-revolutionary British customs raids. Apart from generalized notions that there may be illegal aliens in a particular area, the INS seals off an entire factory and detains all the workers for an hour to two hours without reason to suspect even a single individual. Because of the grave danger posed by such affronts to our freedom, our founding fathers determined that general seizures such as the INS surveys are unreasonable *per se* under the Fourth Amendment.

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<sup>27</sup>N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, pp. 51-53 (reprinted in 1970). The writs of assistance were warrants which empowered British customs officials and their deputies to search at will to find persons whom they suspected to have smuggled molasses into the Colonies without the payment of customs' duties, or to find evidence of smuggling.

<sup>28</sup>Lasson, p. 51, citing Albert Bushnell Hart, in *American History Leaflets*, No. 33, Introduction.

<sup>29</sup>Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 411 (1974).

**2. Previous Decisions of This Court Demonstrate That INS Surveys Constitute Unreasonable Seizures.**

a. The extraordinary length of the detention involved in the surveys establishes convincingly their illegality under the Fourth Amendment. In *United States v. Place*, 103 S.Ct. 2637 (1983), this Court held that the detention of the respondent's luggage for ninety minutes, alone, precluded the conclusion that the seizure was reasonable in the absence of probable cause. The brevity of the invasion "is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." *United States v. Place*, *supra* at 2645; *Florida v. Royer*, *supra*. Any investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Moreover, it is "the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, *supra* at 1326. INS workplace surveys are really fishing expeditions which punish the majority of the innocent in order to apprehend a few lawbreakers. Thus, even though most people are asked only a question or two in order to "survey" the entire workforce, everyone must remain under detention for one hour to two hours.

It is apparent that the INS cannot show that it is necessary to detain a person for an hour and one-half in a survey in order to ask him one or two questions. Moreover, the INS could, if it chose to respect individual rights, engage in the kind of police investigation that law enforcement agencies traditionally carry out in order to obtain evidence upon which to base an individualized suspicion of illegal alienage and probable cause for arrest. The INS cannot meet its burden of showing that it is necessary to capture hundreds of innocent workers at once without any basis of suspicion in order to fish out a few persons for further investigation. *Florida v. Royer*, *supra*.

INS factory surveys closely resemble traditional arrests. Although the element of transportation to the police station is absent (*Dunaway v. New York*, 442 U.S. 200 (1979)), the number of



agents involved, the badges they wear, and the handcuffs and other equipment that they carry contribute to the transformation of the workplace into what is effectively an INS interrogation room. These extensive and lengthy surveys are a far cry from the brief investigatory stop by a police officer or two in a public place of *Terry v. Ohio*, *supra* or *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

In *Terry* and its progeny, this Court created a limited exception to the rule requiring that a seizure be based on probable cause to believe that the persons seized committed a crime. That exception authorized officers to minimally intrude upon an individual's Fourth Amendment rights for the purpose of investigating possible criminal behavior on the basis of a reasonable and articulable suspicion that the person in question had committed or was about to commit a crime. *United States v. Place*, *supra* at 2642. The cases that fall within that limited exception are all characterized by a brief stop by one or two police officers in a public place for the purpose of investigation. *Terry v. Ohio*, *supra*; *United States v. Cortez*, 449 U.S. 411 (1981); *United States v. Mendenhall*, 446 U.S. 544 (1980). The seizures at issue in this case are far more intrusive. They are carried out by numerous agents, they are characterized by substantial displays of force, and they do not occur in a public place but rather depend upon the capture of the workers in their enclosed workplaces.

Petitioners assert that the public interest in apprehending aliens who become assimilated into the population of our urban areas justifies the surveys. This Court has held, however, that the substantial public interest in protecting our borders and preventing the entry of illegal aliens does not justify indiscriminate detention for questioning of persons in border areas. *Brignoni-Ponce*, *supra*; *United States v. Cortez*, *supra*. As this Court held in *Cortez*:

"The detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." 449 U.S. 417-418.

Petitioners' justification for the workplace surveys is that they are an effective means of detecting illegal aliens who have eluded



the border patrol. Petitioners have not suggested, however, that there is any greater public policy interest served by the workplace surveys than by the roving Border Patrol stops involved in *Brigioni-Ponce, supra*, and *U.S. v. Cortez, supra*. Thus the seizures that are involved in this case are controlled by those earlier decided immigration enforcement cases.

b. Although Petitioners contend that they should be permitted to carry out the surveys without any individualized basis of suspicion, (*U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976)), the case on which they principally rely stands for a much more narrow proposition. In *Martinez-Fuerte*, the Court permitted a limited exception to the general doctrine that an investigatory stop must be justified by objective manifestations that the person stopped is, or is about to be, engaged in criminal activity. A fixed checkpoint operated by the Border Patrol was permitted at or near intersections of important highways leading away from the border for the purpose of interdicting the flow of illegal traffic from Mexico. The checkpoint in *Martinez-Fuerte* satisfied this Court's definition of a functional border equivalent since it was located "at a point marking the confluence of two or more roads that extend from the border." *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). At the physical borders of the United States and its functional equivalents, Fourth Amendment protection is not as great as in the interior of this country. *Almeida-Sanchez v. United States, supra*; *United States v. Barbera*, 514 F.2d 294 (2nd Cir. 1975). The Petitioners do not contend that the surveys are conducted at functional equivalents of the border, nor that they assist in border enforcement. To the contrary, they admit that the surveys are part of a nationwide program designed to apprehend illegal aliens who have taken up residence and become employed in industrialized areas in the interior of this country.

Integral to *Martinez-Fuerte* was the pre-established and publicly known location of the checkpoint, which could reasonably be calculated to result in minimal fright or annoyance on the part of the motorists who were stopped. Thus the motoring public knew in advance the location of the checkpoints from the "reg-

ularized manner'' in which the checkpoints were operated, and knew precisely what to expect when they arrived at a checkpoint. *Martinez-Fuerte*, *supra* at 559.

Although this Court in *Martinez-Fuerte* found permanent checkpoints to be appreciably less intrusive than roving patrol stops, INS workplace surveys are more intrusive than either the permanent checkpoint in *Martinez-Fuerte* or the roving patrol stop of *Brignoni-Ponce*. INS workplace surveys are also roving and the workers are given absolutely no warning before the INS agents suddenly appear and seal off the factory. As the Court of Appeals found, the workplace surveys generate considerable fear and anxiety on the part of the workers who are subjected to the survey. *ILGWU*, 681 F.2d at 644. In contrast, the permanent checkpoints result in minimal potential interference with legitimate traffic since perhaps .5% of automobiles that travel through the checkpoint are even required to stop for a brief three-to-five-minute period. All the others are merely required to slow down or stop for a second or two.

Workers interrogated in surveys suffer a greater invasion of privacy because they must divulge personal information about their citizenship and place of birth not only to INS agents but also to their co-workers seated around them. Moreover, their forced detention of one and one-half hours is far more burdensome than the brief intrusion involved in *Almeida-Sanchez*.

Brief stops of vehicles on highways have a long history in this country and are accepted by motorists as incidental to highway use.<sup>30</sup> *Martinez-Fuerte*, *supra*, at 560-561. Thus *Martinez-Fuerte* falls within a "special category" of Fourth Amendment cases

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<sup>30</sup>In comparison, workplace surveys in urban areas are of very recent vintage. They began to be utilized by the INS only in 1975. *Hearing on Undocumented Aliens*, Feb. 24, 1978, before the Subcommittee of the Department of State, Justice & Commerce, the Judiciary, and Related Agencies Appropriations; U.S. House of Representatives, 95th Congress, 2d Session, testimony of Carlos Vellanoweth, p. 324; John Brechtel Dep. p. 7.

which recognize that a lesser degree of privacy is accorded to the occupants of automobiles than to persons in homes or offices. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315, n. 10 (1978); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970). This Court was also careful to emphasize in *Martinez-Fuerte* that INS agents at the permanent checkpoints have limited discretionary enforcement authority. In contrast, as the Court of Appeals observed, in the factory survey the agents have virtually unfettered discretion to question anyone or everyone in the workplace. Moreover, they have unlimited discretion to select any workplace of their choice for a survey at any given time.

*United States v. Villamonte-Marquez*, 103 S.Ct. 2573 (1983), is also relied upon by Petitioners, but has no bearing upon INS workplace surveys. The decision turned upon a lengthy statutory history which reflected that the same Congress which promulgated the Fourth Amendment intended an exception for the vessel boardings that were at issue in the case. Further, the case involved the far more limited expectations of privacy that are involved in the brief detention and boarding of a vehicle on a public waterway in order to check documents. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315, n. 10 (1978). A far better comparison is presented by *United States v. Ortiz*, 422 U.S. 81 (1975) which also involved permanent checkpoints but which invalidated automobile searches for illegal aliens in the absence of probable cause. *Ortiz* demonstrates that a substantial intrusion upon privacy such as the INS workplace surveys cannot be justified under the limited exception of *Almeida-Sanchez*.

### **3. INS Surveys Do Not Further National Immigration Policy Objectives.**

Petitioners assert that the workplace surveys are in the national interest because aliens create economic and social problems and compete with citizens and legal resident aliens for jobs. The evidence suggests, however, that the surveys at best represent a superficial approach to a very complex national problem. As the Attorney-General of the United States recently testified, the targets of the INS factory surveys are "largely . . . persons with a

permanent attachment to the nation," who are "unlikely to be displaced from our territory." Thus the Attorney-General observed that many of these people have "become, in effect, members of the community," and asked Congress to grant "limited legal status to the productive and law-abiding members of this shadow population," and to "recognize reality and devote our enforcement resources to deterring future illegal arrivals." *Plyler v. Doe*, 457 U.S. 202, 218, n. 17 (1982).<sup>31</sup> Moreover, as this Court states in *Plyler v. Doe, Id.*, at 228.

"the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the State fisc."<sup>32</sup>

Although Petitioners rely on apprehension statistics for illegal aliens who are apprehended in the course of workplace surveys, it is questionable whether these surveys have any actual long-term salutary effect. The evidence suggests that undocumented aliens hold jobs that U.S. citizens and resident aliens refuse to take.<sup>33</sup>

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<sup>31</sup>Former INS Commissioner Leonard Chapman testified in 1978 that it was "unthinkable" to him "to field an army of investigators to ransack our cities to find the millions of illegal aliens who are living in the midst of 220 million Americans." His proposal to deal with the problem of illegal immigration was (1) better prevention to prevent entry at the border at ports of entry, and (2) legislation to make it illegal to hire illegal aliens. *Hearings on Oversight of the Immigration & Naturalization Service before the Subcommittee on Immigration, Citizenship & International Law of the House Committee on the Judiciary*, 95th Congress, 2d Session, p. 88 (1978).

<sup>32</sup>The Select Commission recently determined that undocumented/illegal aliens do not place a substantial burden on social services and found, further, with respect to job displacement that economists differ about whether or not illegal aliens take jobs of American citizens and resident legal aliens, or just take jobs that American workers don't want. *U.S. Immigration Policy & the National Interest: Committees on Judiciary, House of Representatives and the United States Senate*, 97th Cong., 1st Session, p. 37 (1981).

<sup>33</sup>Cornelius, *Mexican Migration to the United States: Causes, Consequences, and U.S. Responses*, Center for International Studies, Massachusetts Institute of Technology, pp. 55-56, 66-67, 70 (1978).

Thus, the factory surveys create a revolving door effect because illegal aliens transported across the Mexican border after factory surveys return to their jobs after a day or two.<sup>34</sup> Perhaps because Congress in fact perceives that illegal aliens help the economy,<sup>35</sup> it is lawful for employers to hire illegal aliens. Thus under 8 U.S.C. 1324(a), employment of illegal aliens is expressly excluded from the definition of harboring. Moreover, Congress has repeatedly failed to take the necessary steps to solve the problem of illegal immigration.<sup>36</sup> As long as foreign workers are encouraged to enter this country illegally by our policy of treating the employment of undocumented workers as lawful and through the inadequate enforcement of our immigration laws at our borders,<sup>37</sup>

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<sup>34</sup>In 1982, the INS publicized a series of workplace surveys dubbed "Operation Jobs" with the stated objective of opening "higher paying" jobs for unemployed Americans and legal residents by deporting illegal aliens. Of the 5,635 illegal aliens that were suspected to be present in the factories, 801 were arrested and deported. The Los Angeles Times found that 80% of those illegal aliens were back on the job three months after the surveys were conducted. "Most Aliens Regain Jobs After Raids," Los Angeles Times, August 1982.

<sup>35</sup>Note, *Developments-Aliens*, 96 Harv. L.Rev. 1286, 1441 (1983).

<sup>36</sup>As Justice Powell observed in *Plyler v. Doe*, "perhaps because of the intractability of the problem, Congress . . . has not provided effective leadership in dealing with this problem." 457 U.S. 202, 237 (1982). The most recent immigration bill which, if passed, would have the effect of legalizing the status of millions of illegal aliens, while imposing criminal sanctions on employers who hire illegal aliens, has apparently died in the House of Representatives. "Immigration Bill Dead This Year, O'Neill Says," Los Angeles Times, October 5, 1983.

<sup>37</sup>Thus Congress has provided only a small portion of the funds needed by the border patrol to perform effectively at the borders. Note, *Developments-Aliens*, 96 Harv. L.Rev. 1286, 1439-1440, 1983. As former INS Commissioner Leonel Castillo noted in an interview in 1979, there were only 350 border patrol agents who were on duty patrolling all of the thousands of miles of Mexican/United States and Canadian/United States borders at any one time. Transcript of Firing Line, Interview of Leonel Castillo, telecast on PBS January 21, 1979, Southern Educational Communications Association.

it will be impossible to deal effectively with our immigration problems. INS workplace surveys simply do not provide a solution and are enormously destructive of the Fourth Amendment rights of a large segment of our society.

The surveys themselves have not been seriously proposed as a solution to the problem of illegal immigration.<sup>38</sup> To the contrary, the Select Commission on Immigration and Refugee Policy, in its *Final Report and Recommendations*, recommended a large increase in manpower and resources at the Mexican border, employer sanctions, higher levels of legal immigration and the legalization of illegal aliens now in the United States, while opposing any massive deportation program which would inevitably sacrifice the rights of many legal residents without reaching more than a small portion of the illegal aliens residing in this country.<sup>39</sup> Further, the United States Commission on Civil Rights in 1980 concluded that the "INS should immediately cease its area control operations as currently conducted, to prevent the continued violation of the constitutional and civil rights of individuals."<sup>40</sup>

In *Plyler v. Doe*, *supra*, at 228-229 (1982), this Court rejected the State of Texas' contention that barring the children of illegal aliens from Texas schools would promote the nation's interest in preventing illegal immigration. As this Court stated:

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<sup>38</sup>Current INS Commissioner Alan C. Nelson has stated that only a three-pronged approach of employer sanctions, amnesty for many illegal aliens already here, and stepped-up enforcement at the border could make a lasting difference. The INS is currently seeking a 50% increase in the number of border patrol officers. "INS Chief Seeks Boost in Patrols," Los Angeles Times, October 7, 1983.

<sup>39</sup>U.S. Immigration Policy and the National Interest, the Final Report of the Select Commission on Immigration and Refugee Policy of the Senate Committee on the Judiciary and Subcommittee on Immigration Refugees and International Law of the House Committee on the Judiciary, 97th Congress, 1st Session, pp. 72-73 (1981).

<sup>40</sup>"The Tarnished Golden Door: Civil Rights Issues in Immigration," U.S. Commission on Civil Rights, p. 94 (1980).

“[W]e think it clear that ‘charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration,’ at least when compared with the alternative of prohibiting the employment of illegal aliens.”

Similarly, INS workplace surveys apprehend relatively few of the millions of undocumented workers who have taken up residence in our cities without having any appreciable effect on the overall immigration problem. Many of the deported workers, drawn by the jobs that are lawfully held open for them by their employers, succeed in repeatedly crossing the Mexican border and resuming their residency in this country.<sup>41</sup> The places of those workers who fail to return are taken by other illegal immigrants from Mexico or Central America, who are drawn by poverty and high unemployment in their own countries and the prospect of jobs in the United States.<sup>42</sup>

Moreover, the INS workplace surveys are carried out at an enormous price to our people and our democratic ideals. In addition to the thousands of members of our community who have been uprooted as a result of the surveys,<sup>43</sup> a far greater number of entirely innocent citizens and legal resident aliens have been subjected to wholesale intrusions on their personal security. Many thousands of other Hispanic-Americans in our central cities who

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<sup>41</sup>In a study of illegal immigration, 69% of the illegal aliens (residing in the United States) who had entered the United States illegally, had previously been apprehended on one or more occasions. Cornelius, *Mexican Migration to the United States: Causes, Consequences, and U.S. Responses*, Center for International Studies, Massachusetts Institute of Technology, p. 24 (1978).

<sup>42</sup>See Cornelius, *id.*, generally at 31-43.

<sup>43</sup>In presenting to Congress several presidential proposals for immigration reform, the Attorney-General stated that:

“We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community.” *Plyler v. Doe*, 457 U.S. 202, 218, n. 17 (1982).



have learned about the surveys from their friends and neighbors and from the widespread publicity that the surveys have received, live in fear that their workplaces will soon be targeted for an INS survey.<sup>44</sup>

**C. The Fourth Amendment Requires That INS Agents Have a Particularized and Objective Suspicion of Illegal Alienage in Order to Detain Any Person for Questioning.**

**1. INS Agents Must Have a Suspicion of Illegal Alienage in Order to Detain Any Workers for Questioning in Workplace Surveys.**

a. As the Court of Appeals correctly held, all of the persons in a workplace are seized before any questioning has begun in the course of INS workplace surveys. Until information is elicited through the questioning process, the INS agents have no reason to suspect any of the detained workers of being illegal aliens, or even aliens, since the agents do not know the identities of the workers in the workplace and have no specific information about any of them.<sup>45</sup> However, the issue of what standard applies to detentive questioning by INS agents remains.

The Court of Appeals concluded correctly that INS agents must have an individualized and articulable basis to suspect any person detained for questioning of illegal alienage.<sup>46</sup> In *United States v.*

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<sup>44</sup>The INS conducts surveys in many industries that employ large numbers of unskilled or semi-skilled workers. J.A. 46-47. Those industries also characteristically employ many Hispanic-Americans and the surveys, in Southern California, take place largely in factories that predominately employ Hispanic-Americans. Tellez Dep. p. 7; Brechtel Dep. p. 16; Walters Dep. p. 25.

<sup>45</sup>Petitioners admit that when the INS is denied entry by an employer, they can only obtain a generalized warrant since they are unable to name or specifically describe the persons they are seeking to apprehend. Brief for the Petitioners at n. 18.

<sup>46</sup>The Select Commission recommended that temporary detention for brief interrogation be permissible only on the basis of reasonable cause to believe that the person detained is an illegal alien. *U.S. Immigration Policy and the National Interest, the Final Report of the Select Commission on Immigration and Refugee Policy of the Senate Committee on the Judiciary and Subcommittee on Immigration Refugees and International Law of the House Committee on Judiciary, 97th Congress, 1st Session, Section VIII A.1 (1981).*

*Brignoni-Ponce*, 442 U.S. 873, 884, this Court held that border patrol officers on roving patrol may briefly stop vehicles on roads near the border "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." Although *Brignoni* reserved the question of whether border patrol officers may stop persons reasonably suspected to be aliens, the reasoning of *Brignoni* and of subsequent decisions by this Court suggests that INS agents who carry out workplace surveys may detain persons for questioning only on the basis of a reasonable suspicion of illegal alienage. *United States v. Cortez*, 449 U.S. 411, 419, 695 (1981); *Florida v. Royer*, 103 S.Ct. 1319, 1324 (1983); *Reid v. Georgia*, 448 U.S. 438, 440 (1980).

The decision in *Brignoni-Ponce* conformed to the doctrine that in exigent circumstances, the importance of the governmental interest involved may justify a brief stop based upon facts that do not amount to probable cause for arrest. *Terry v. Ohio*, 392 U.S. 1 (1968). Cases decided since *Brignoni* have held that even if the exigencies of the law enforcement interest involved permit a brief stop under *Terry*, the stop is permissible only on the basis of reasonable suspicion that someone has committed or is about to commit a crime. As this Court stated in *Florida v. Royer*, 103 S.Ct. at 1324:

"*Terry* created a limited exception . . . certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime."

See also, *Reid v. Georgia*, 448 U.S. 438, 440; *Michigan v. Summers*, 452 U.S. 692 at 699 (1981). In the case of *United States v. Cortez*, *supra*, which involved the stop of a vehicle by the Border Patrol, this Court addressed the question reserved in *Brignoni* and determined that border patrol officers must be able to justify any investigatory stop on the basis of a particularized and objective basis to suspect the particular person stopped of illegal entry.

The "exigent circumstances" involved in the operation of cars suggests that the standard of *Brignoni-Ponce* is less stringent than the standard to be applied to pedestrians. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314, n. 10. Moreover, since workplace surveys by their nature are severely intrusive of the rights of citizens and legal residents, but only of limited value in preventing or deterring illegal immigration, they serve a far lesser governmental interest than the roving patrol stops of *Brignoni-Ponce*, which were found necessary because of "the absence of practical alternatives to police the borders." Workplace surveys play no part in policing the border and have only superficial value in ameliorating the problem of illegal immigration in this country.

In *Brignoni-Ponce*, this Court held that it was necessary that Border Patrol agents have reason to suspect that any vehicle stopped in a border area contain illegal immigrants in order to protect the residents of that area from "potentially unlimited interference with their use of the highways." A far greater need exists to cure potential abuse of discretion by INS agents who execute workplace surveys because a much greater number of persons with no connection with illegal entry or transportation are detained for a much longer period of time than the characteristic border patrol stop of a minute or two. To permit seizures based upon mere suspicion of alienage alone would clearly "diminish the Fourth Amendment rights of citizens who may be mistaken for aliens." *Brignoni-Ponce* at 884.

Further, the application of the alienage standard urged by the Petitioners would result in discrimination against citizens and residents aliens of Hispanic origin. An INS policy memorandum defines reasonable suspicion of alienage as ethnic physical appearance in conjunction with any facts "such as foreign manner of dress or grooming, apparent inability to speak English, officer's knowledge of a high concentration of aliens in the area, or a specific tip from a reliable informant." J.A. 37-38. *Brignoni-Ponce*, held that a person's ethnic appearance standing alone would justify neither a reasonable belief of alienage nor of illegal alienage. 422 U.S. at 886. Although this Court permitted reliance

upon factors such as mode of dress or grooming "characteristic . . . of persons who live in Mexico," for the seizure of aliens suspected to have crossed our borders unlawfully, 422 U.S. at 885, such factors would have no validity in identifying aliens or illegal aliens among the workers upon whom the surveys focus, since those workers are predominantly persons who have integrated into our society. *Plyler v. Doe*, *supra*, at n. 17; J.A. 58-59, 66-67. One would be more likely to find an American college sophomore wearing a sombrero or huaraches [Mexican sandals] on a college campus, clothing of the kind that INS agents testified they look for in the surveys (*e.g.*, Smith Dep. pp. 170-171; Clarin Dep. 75-78) than an illegal alien, who would probably try to look like and act like his fellow workers of American descent, particularly because of his undocumented status. In a study of hundreds of recent immigrants from Mexico, not a single individual was encountered wearing a sombrero or huaraches. J.A. 58. Studies of Mexican labor immigration have shown that speaking with a foreign accent or difficulty in speaking English, physical appearance, mannerisms, dress, nervousness or avoiding eye contact are inadequate criteria for distinguishing between aliens or illegal aliens and American citizens who are part of Mexican-American culture.<sup>47</sup>

"Apparent inability to speak English" could only be determined after the detentive questioning had already occurred. Hence the INS policy memorandum states that suspicion of illegal alienage arises "generally after initial questioning on the basis of suspicion of alienage alone." J.A. 38. Even if one were to assume *arguendo* that an INS agent could lawfully question a worker in order to ascertain his ability to speak English, it would be of no assistance in determining alienage. Over three-quarters of all

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<sup>47</sup>See generally, J.A. pp. 55-76; Declarations of Wayne A. Cornelius, Sheldon Maram, Joe Razo, Edward Tchakalian. Thus, for example, 33% of U.S. citizens and legal resident aliens who originated from Mexico have no English competence and an additional 45% speak only a little English. J.A. 57.

United States citizens and legal resident aliens who originated from Mexico speak little or no English. J.A. 57. The "officer's knowledge of a high concentration of aliens in the area," would obviously be useless because of vagueness to distinguish aliens from U.S. citizens. The final listed factor of a "tip from a reliable informant," is simply never present. Petitioners admit that they conduct the surveys because of a lack of specific information permitting them to identify any particular individuals. Thus the only objective factor upon which distinctions among workers could actually be made under an alienage standard would be ethnic appearance. The result would be either discrimination against Hispanics or arbitrary selection based upon the whims of individual investigators in violation of the Fourth Amendment. *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1945); *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973).

In addition to its adverse effects on U.S. citizens of all backgrounds and its discriminating effects on Hispanic-Americans, a standard of detentive questioning based upon alienage alone would effectively deprive millions<sup>48</sup> of aliens lawfully residing in this country, many of them long-term residents, of their Fourth Amendment rights.

b. There is no statutory basis for any lesser standard of suspicion for detention than illegal alienage. 8 U.S.C. 1357(a)(1) does enable INS agents to question aliens as to their right to remain in the United States, but does not purport to authorize the detention of persons for interrogation upon mere suspicion of alienage.<sup>49</sup> Though Petitioners urge that Section 1357(a)(1) be

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<sup>48</sup>According to the 1980 United States Census, 5,182,000 registered aliens reside in the United States, including 1,096,000 persons originating from Mexico. Warren & Passel, *Estimates of Illegal Aliens from Mexico Counted in the 1980 United States Census* (1983).

<sup>49</sup>Lower courts have interpreted the authority of police officers and administrative officials to permit seizures only on the basis of suspicion of unlawful conduct. *Green v. United States*, 259 F.2d 80 (D.C. Cir. 1958), cert. denied 359 U.S. 907 (1959); *United States v. Grandi*, 424 F.2d 399 (2d Cir. 1970).

construed to permit the detention of persons on mere suspicion of alienage, such a construction would violate the principle of constitutional adjudication to construe the statute "if possible, in a manner consistent with the Fourth Amendment." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). Thus the court below and other courts have construed Section 1357(a)(1) to authorize only questioning, but not the seizure of persons for questioning in the absence of reasonable suspicion of illegal alienage.<sup>50</sup> Moreover, this Court construed Section 1357(a)(1) to permit vehicle stops by the border patrol only on the basis of illegal alienage in *Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

Petitioners assert that the alien registration requirements of 8 U.S.C. Section 1304(a) justify detaining lawful resident aliens at any time, regardless of suspicion of wrong doing. The purpose of Section 1304(a) is to apprise the government of the number of aliens in this country and of their status. *United States v. Campos-Serrano*, 430 F.2d 173 (7th Cir. 1970), *affirmed* 404 U.S. 293, *cert. denied* 404 U.S. 1023. In order to carry out this purpose, it is not necessary that entirely innocent aliens be constantly subject to detention for questioning, as Petitioners suggest, since the alien registration requirements of 8 U.S.C. Section 1305 serve the same purpose.

Under Section 1305, aliens are required to register every change of address with the Attorney-General, or upon ten days notice from the Attorney-General, to notify the Attorney-General of their current addresses and such additional information as may be required. In 1981, Congress amended Section 1305 to eliminate the requirement that permanent residents register annually and temporary residents every three months. This amendment reflected a Congressional determination to eliminate an "unnec-

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<sup>50</sup>*International Ladies' Garment Workers v. Sureck*, 681 F.2d 624; *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied* 404 U.S. 864 (1971); *Ojeda-Vinales v. INS*, 523 F.2d 286 (2d Cir. 1975); *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977) (*en banc*).

essary burden" upon permanent resident aliens because existing registration records maintained by the INS were adequate when supplemented with change-of-address information to "meet the needs of the INS in the event the whereabouts of such individuals are needed. . . ."<sup>51</sup> Thus, no legitimate governmental interest connected with the registration requirements of 8 U.S.C. 1301 *et seq.* would be promoted by a standard which would permit innocent permanent and temporary resident aliens to be detained for questioning at the whim of INS agents.

c. Contrary to Petitioner's suggestion, this case cannot be compared to the "carefully defined classes of case," that involved businesses known to be within the scope of regulation, and inspections that are impersonal in nature. (*Marshall v. Barlow's, Inc.*, 436 U.S. 307, 317 (1978)). In contrast, this case has nothing to do with pervasively regulated businesses but rather concerns persons who are not known to be aliens, much less illegal aliens, *Almeida-Sanchez v. United States*, 413 U.S. 266, 271-272, and the highly intrusive and personal seizure of such persons. Petitioner's proposed standard would permit INS agents virtually unfettered discretion to roam at will among the places of work of our citizenry and to detain almost anyone at will. This Court has never suggested in any of its decisions that the Fourth Amendment can accommodate such an unlimited and highly intrusive program of governmental investigation.

Petitioners also suggest, as an alternative, that INS agents be permitted to detain all persons in any workplace that they choose to survey, for interrogation concerning their right to be in this country. The premise of the proposal, that it is justifiable to detain a majority of innocent workers in a workplace and to compel them to answer questions in order to uncover and apprehend some undocumented aliens is "intolerable and unreasonable." *Carroll v. United States*, 267 U.S. 132, 153 (1925).

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<sup>51</sup>House Report 97-116 to Immigration and Nationality Act Amendments of 1981, reprinted in 1981 U.S. Code Cong. and Admin. News p. 2595.



**2. INS Agents Must Have a Particularized Suspicion That Each Person Detained for Questioning in a Workplace Survey Is an Illegal Alien.**

Petitioners admit that other than on rare occasions, INS agents who perform workplace surveys have no information upon which to suspect any of the individuals employed within the workplace of being illegal aliens. (Petitioners' Brief at 43.) At Davis Pleating, for example, the affidavit in support of the general warrant that issued for the January 1977 survey consisted of statements made by aliens apprehended while attempting to enter to the effect that they believed other illegal aliens were presently employed without naming or describing any particular persons. The only particular statement in the affidavit was from the INS agent affiant who stated that he personally "noted that 20 persons of apparent Latin decent [sic] entered [through the west door]." (*ILGWU*, n. 5.) Petitioners argue, in effect, that since INS agents are unable to comply with the Fourth Amendment particularity requirement in carrying out workplace surveys, they should be excused from the requirement so that they can continue to carry out the surveys.

The primary abuse thought to characterize the writs of assistance which led to the passage of the Fourth Amendment "was their indiscriminate quality, the license that they gave to search every man without particularized cause. . . ." <sup>52</sup> Workplace surveys closely resemble general searches and seizures typified by writs of assistance. The pre-constitutional history of the Fourth Amendment establishes that the particularity requirement was adopted to insure that there be justification to interfere with the security of the particular person being seized or searched and also to guard against the danger of the petty tyranny of arbitrary searches or seizures. <sup>53</sup> Petitioners seek to be relieved from the particularity requirement precisely because they have no justification to interfere with the security of the many thousands of

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<sup>52</sup>Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 366 (1974).

<sup>53</sup>Amsterdam, at p. 421.

innocent particular United States citizens and permanent legal resident aliens who are detained in the surveys. It is evident that only the particularity requirement of the Fourth Amendment protects persons who are captured in workplace surveys from arbitrary or indiscriminate seizures. This Court has held that INS agents who stop persons suspected of illegal alienage in border areas "must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 419 (1981). In contrast to the important governmental interest involved in *Cortez* of patrolling our borders, factory surveys are of questionable value in carrying out the legitimate objectives of our immigration laws, far more disruptive of the daily lives of many more of our citizens and much more intrusive than roving border stops of automobiles. There is no reason that any lesser standard of particularity should apply to workplace surveys.

Although the INS rarely has reason to suspect even a single worker before detaining all of the workers in the workplace during a survey, Petitioners argue that if there is reason to suspect some workers of being illegal aliens, this translates into a basis of suspicion for all the remaining workers in the workplace. This Court has rejected the notion of guilt by association. Thus, mere proximity to others suspected of crime does not give rise to a reasonable suspicion of criminal activity. *Ybarra v. Illinois*, 44 U.S. 85, 91 (1979); *Brown v. Texas*, 443 U.S. 47, 52 (1979); *Sibron v. New York*, 392 U.S. 40, 62 (1968). Similarly, mere appearance of Mexican ancestry and apprehension in an area where illegal aliens are frequently found cannot be the basis upon which to seize someone for investigation of illegal alienage. *United States v. Brignoni-Ponce*, *supra*; *United States v. Heredia-Castillo*, 616 F.2d 1147 (9th Cir. 1980).

Further, when the border patrol stops a vehicle in a border area, neither the driver nor any of the passengers may be questioned in the absence of reasonable cause to suspect the particular

persons being questioned of being illegal aliens.<sup>54</sup> *United States v. Cortez*, *supra*; *United States v. Heredia-Castillo*, 616 F.2d 1147, 1149 (9th Cir. 1980).

Petitioners' reliance upon this Court's previous cases involving administrative inspections simply ignores the vast and crucial distinctions between those cases and the facts at issue in this case. First, in the administrative search cases, the discretion of the officers is severely limited by the scheme of regulation itself. In *Colonade Corp. v. United States*, 397 U.S. 72 (1970) and *United States v. Biswell*, 406 U.S. 311 (1972), "the searching officers knew with certainty that the premises searched were in fact utilized for the sale of liquor or guns," while here the INS agents have no idea whether the persons in the workplace are aliens, much less illegal aliens. *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973). In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), agents of the Secretary of Labor could search only for safety or health hazards by virtue of the congressional scheme of regulation, but INS agents can question anyone that they choose. There is no law which makes it unlawful to employ illegal aliens and there is no limitation whatsoever that exists upon the discretion of INS agents in the field. They can decide what workplaces to survey at any given time and what individuals to detain without any limitation on their discretion. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 357 (1977).

A second major distinction between this case and the administrative search cases is that those cases involve only a very minor intrusion upon the personal privacy of the owner of the premises and virtually no intrusion at all on the privacy of anyone else. In this case, the surveys result in a substantial intrusion upon the

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<sup>54</sup>In order to police our borders, the border patrol must necessarily stop vehicles containing persons reasonably suspected to be illegal aliens, even if not all of the occupants are suspected illegal aliens. Border Patrol stops, however, often involve cases of illegal smuggling where all of the occupants of the vehicle that is stopped are suspected to be illegal aliens. Cf. *United States v. Cortez*, *supra*.

personal privacy of many persons in each workplace that is surveyed.<sup>55</sup>

Petitioners are supported only by a poorly reasoned decision, *Babula v. INS*, 665 F.2d 293 (3rd Cir. 1981), that conflicts not only with the opinions of all other lower courts that have considered the question but also with a previous Third Circuit decision which required individualized suspicion for an INS investigative detention. *Lee v. INS*, 590 F.2d 497 (3rd Cir. 1979). Contrary to *Babula*, all other courts have required that detentive questioning be supported by individualized suspicion. *Sureck*, 681 F.2d at 634; *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977) (*en banc*), *modifying on other grounds* 540 F.2d 1062, 1070 (7th Cir. 1977); *Ojeda-Vinales v. INS*, 523 F.2d 286, 288 (2d Cir. 1975); *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir. 1971); *Marquez v. Kiley*, 436 F.Supp. 100, 114 (S.D.N.Y. 1977); *LaDuke v. Nelson*, 560 F.Supp. 158 (E.D. Wash. 1982).

In contrast to the facts of this case, *Babula* did not concern itself with the rights of United States citizens and legal resident aliens. The issue came up in the review of a deportation order and the Petitioners argued that the exclusionary rule should have been applied to their admissions to INS agents because those admissions were obtained in response to detentive interrogation by INS agents. Although the Court acknowledged that "questioning without individualized suspicion raises serious Constitutional concerns," 665 F.2d at 297, it provided no analysis to justify the holding that the employees who were detained could be questioned without individualized suspicion. Moreover, the

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<sup>55</sup>Petitioners' reliance on *United States v. Villamonte-Marquez*, 103 S.Ct. 2573 (1983) is also misplaced. In that case, the legislative history of 19 U.S.C. § 1581(a) reflected that the First Congress which enacted the Fourth Amendment did not intend, thereby, to invalidate the suspicionless boarding of vessels by government officers. Moreover, the seizure was effectuated in a public ship channel and the attendant detention was brief. None of these factors are present in this case.

*Babula* court acknowledged that the agents detained the Petitioners when they surrounded the factory, 665 F.2d at 298, but failed to consider at all any of the other intrusive aspects of workplace surveys that were integral to the decision of the Ninth Circuit in this case. It is evident that *Babula* is simply an inadequately reasoned and wrongly decided case.

In sum, there is no justification to excuse the INS from the particularity requirement of the Fourth Amendment. If INS agents were permitted to detain our citizens, at will, based upon a generalized suspicion that illegal aliens might be present in a particular workplace or neighborhood, none of us would be safe from the tyranny of arbitrary INS detentions.

## II.

### INS WORKPLACE SURVEYS DISCRIMINATE AGAINST PERSONS OF LATIN ANCESTRY IN VIOLATION OF THE FIFTH AMENDMENT.

The INS factory surveys should be enjoined because they improperly discriminate against persons of Hispanic origin in violation of the due process clause of the Fifth Amendment. To the extent that the INS agents adhere to some standard in determining whom to question, it is evident that this standard is so vague and general and so slanted towards those of Hispanic origin that the only real factor that emerges is whether the "suspect" is Latin. Latin appearance is mentioned time and time again when agents attempt to articulate the standards they apply in deciding whether to approach an individual.<sup>56</sup> Moreover, the surveys take place in factories whose workforces are predominantly Hispanic<sup>57</sup> American and those victimized by the surveys clearly perceive them as being directed solely at persons<sup>58</sup> of Hispanic origin. Further, the extent of cross-culturization of Hispanic-American neighbor-

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<sup>56</sup>Smith Dep. p. 167; Tellez Dep. pp. 7-8, 20; Walters Dep. p. 43; Brechtel Dep. pp. 17, 29.

<sup>57</sup>Tellez Dep. p. 7; Brechtel Dep. p. 16; Walters Dep. p. 25.

<sup>58</sup>Miramontes Dep. pp. 43, 47, 51; Correa Dep. p. 66; Labonte Dep. pp. 58-59, 64, 66-67; Delgado Dep. p. 52.

hoods is such that the factors INS agents purport to apply, even if vigorously observed, would fail to distinguish to any meaningful degree between undocumented aliens from Latin-America and citizens of Hispanic ancestry. J.A. 59, 67.

As the Ninth Circuit noted in *United States v. Mallides, supra*, innocuous conduct does not become suspect merely because the person observed is non-white. Yet that is precisely what occurs during these raids. Every Latin is suspected of being an undocumented alien due to his or her race. Members of a distinct minority characterized by immutable traits are singled out because they are suspected to be illegal aliens. As a result, innocent members of the class suffer an impairment of their privacy (a loss not suffered by members of the White or Black community) because the standard applied fails to distinguish in any meaningful way between the guilty and the innocent.<sup>59</sup>

Respondents contend that this constitutes a denial of equal protection of the law to citizens of Hispanic origin.

### Conclusion.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

HENRY R. FENTON,  
(*Counsel of Record*),

GORDON K. HUBEL,  
LEVY AND GOLDMAN,

MAX ZIMNY,

*Attorneys for Respondents.*

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<sup>59</sup>"Minority Groups and the Fourth Amendment Standard of Certitude," 11 Harv.C.R.-C.L.L.Rev. 733 (1976).

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CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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IMMIGRATION AND NATURALIZATION SERVICE,  
ET AL., PETITIONERS

v.

HERMAN DELGADO, ET AL.

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ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONERS

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REX E. LEE  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

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# TABLE OF AUTHORITIES

Page

## Cases:

<i>Brown v. Texas</i> , 443 U.S. 47 .....	15
<i>Davis v. Mississippi</i> , 394 U.S. 721 .....	15
<i>Mancusi v. DeForte</i> , 392 U.S. 364 .....	3
<i>Marshall v. Barlow's, Inc.</i> , 436 U.S. 307 .....	3
<i>Michigan v. Summers</i> , 452 U.S. 692 .....	15
* <i>Sibron v. New York</i> , 392 U.S. 40 .....	15
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873 .....	11, 12, 13
<i>United States v. Cortez</i> , 449 U.S. 411 .....	11, 12, 13
<i>United States v. Di Re</i> , 332 U.S. 581 .....	15
<i>United States v. Knotts</i> , No. 81-1802 (Mar. 2, 1983) .....	3
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 .....	8, 9, 14
<i>United States v. Mendenhall</i> , 446 U.S. 544 .....	6
<i>United States v. Ortiz</i> , 422 U.S. 891 .....	9
<i>Ybarra v. Illinois</i> , 444 U.S. 85 .....	15

## II

### Page

#### Constitution, statute and regulation:

U.S. Const. Amend. IV . . . . 1, 2, 3, 6, 7, 8, 9, 11, 14

U.S. Const. Amend. V (Due Process  
Clause) . . . . . 13

8 U.S.C. 1304(e) . . . . . 6

8 C.F.R. 214.1(e) . . . . . 4

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*ON WRIT OF CERTIORARI TO  
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## REPLY BRIEF FOR THE PETITIONERS

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1. The briefs of respondents and amici are replete with hyperbole heralding the arrival of a police state, but noticeably short on providing a reasoned analysis, based on concrete facts, that would explain how INS factory surveys such as those involved in this case result in anything resembling a Fourth Amendment violation (except in the abstract sense in which the court of appeals concluded that the entire workforce was "seized" for the duration of the surveys without a particularized suspicion of illegality with respect to each worker who happened to be present on the premises). We submit, however, that the Fourth Amendment issues presented in this case cannot be answered by engaging in this type of rhetorical characterization. Indeed, the specific question for decision is whether *respondents'* rights were violated by the INS agents' actions at the factories where they were employed. Accordingly, the best way to

evaluate respondents' Fourth Amendment claims is to focus on the facts as they relate to respondents. It is our submission that a careful examination of these facts will reveal that the INS factory survey procedures challenged here are permissible under the Fourth Amendment.

In support of their assertion that they were "seized" within the meaning of the Fourth Amendment for the duration of the surveys, respondents rely (Br. 15-20) on general characterizations of the surveys as involving, *e.g.*, the "sealing" of the exits and resultant "capture" of the workers, "a massive show of police force" by INS agents who proceeded down the aisles "in para-military formation." Respondents' self-serving characterizations of the surveys, however, are belied by the record, which, as we pointed out in our opening brief (at 8-9, 23, 33), demonstrates that, in fact, respondents themselves moved freely about inside the factories during the surveys and exited the factories in some instances, without being stopped or otherwise subjected to restraint by the INS agents, and that, in their brief contacts with INS officers, respondents were simply asked one or two courteous questions about their immigration status and (in the case of Labonte and Miramontes) were requested to produce the appropriate documentation when they admitted to being aliens.

Even though the record shows that none of the respondents was prevented from leaving the factories during the surveys,<sup>1</sup> respondents point to several factors which, they

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<sup>1</sup>Contrary to respondents' assertions (Br. 10 n.16, 11 n.20), the record supports our contention that Delgado and Labonte exited the factory premises during the September 1977 survey at Davis Pleating (see J.A. 98-99, 135-137). Although respondent Miramontes did not attempt to leave the factory during the survey at Mr. Pleat, there is no reason to believe that she would have been prevented from doing so. Respondents nevertheless rely (Br. 19-20) on Miramontes' statement (J.A. 127) that she feared the INS agents would think she had no papers and would

contend, establish that they reasonably *could* have believed that they were not free to leave. This claim does not withstand analysis.

First, respondents assert (Br. 16) that workers enjoy a substantial right to privacy in the workplace, so that police conduct that would amount to no more than mere questioning in a public place would constitute a seizure if it occurred at a person's place of work. We submit that a person who works in a factory alongside 200 to 300 other employees can have little, if any, reasonable expectations of privacy there. Although the *owner* of commercial premises may object to a *search* of those premises (see, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-313 (1978)), and an employee may also raise a Fourth Amendment objection to the search of his office in certain circumstances (see *Mancusi v. DeForte*, 392 U.S. 364, 369-370 (1968)), this case presents no question regarding a search of commercial premises (or of respondents, for that matter). Respondents have provided no authority to support their claim that a person has a greater

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shoot her if she attempted to leave. But Miramontes' wholly irrational fear is not an adequate basis for concluding that respondents reasonably believed they were not free to leave the factories in the course of the surveys. And, of course, if as she apparently at first feared, Miramontes was not carrying her papers (see Resp. Br. 10-11 & n.18), she would have been subject to lawful arrest on that account. Respondents' reliance (Br. 11 n.20) on another incident in which an INS agent followed an unknown worker who left a factory during a survey also does not support their claim that they were not free to leave: notably, the worker was not prevented from leaving; it is settled that no search or seizure occurs when law enforcement officers simply follow a suspect for surveillance purposes (see *United States v. Knotts*, No. 81-1802 (Mar. 2, 1983)). In fact respondents have misstated the agent's testimony, which was (J.A. 158) that the "person just c[a]me running out of the location . . . toward the parking lot where there was some vehicles parked . . . ." An INS agent would surely have a reasonable suspicion that a worker who runs out of a factory during a survey is an illegal alien. The described conduct of the agent thus reflects greater self-restraint than the Fourth Amendment requires.

right to be free of questioning from government agents in his place of work where, as here, the agents are lawfully present on the premises (pursuant to a warrant or the owner's consent) than in a public place. Respondents' suggestion (Br. 16) that an employee might feel reluctant to leave his work station because of his obligations to his employer simply reinforces the submission in our opening brief (at 22-23) that the "freedom" of an employee to leave is more theoretical than real in this context and that respondents therefore cannot contend that they were seized in any meaningful sense merely because INS agents conducted surveys at their places of employment.

Respondents (Br. 12, 16) and amici (MALDEF Br. 10) also suggest that the INS chooses to conduct surveys at places of employment in order to create the impression that workers who attempt to leave will be acting contrary to the wishes of their employer. This suggestion is both incorrect and unsupported by the record. The INS conducts factory surveys in industries that are known to employ large numbers of illegal aliens for a number of reasons. First, such surveys have a high success rate—as borne out by the percentage of illegal aliens discovered in the workforce during the surveys at issue here—so that the surveys are a reasonable allocation of INS's limited investigative resources. In the two surveys at Davis Pleating, the INS agents found that illegal aliens comprised more than 25% and almost 20% of the workforce, respectively; the survey at Mr. Pleat disclosed that 50% of the employees were illegal aliens. Second, because many illegal aliens are drawn to this country by the prospect of finding employment, and because it is unlawful for a documented nonimmigrant alien to work without authorization (see 8 C.F.R. 214.1(e)), checking the workplace for violations of these and other immigration laws is an integral aspect of INS's enforcement mission. Finally, the workplace is one of the least intrusive

settings in which to conduct an effective immigration enforcement program. Clearly, it is far less intrusive to carry out surveys in the setting of a large factory than in other settings, such as residential locations.

Another factor cited by respondents (Br. 16-17) as creating the perception that the workers are not free to leave—one that was critical to the court of appeals' analysis—is the stationing of agents at the doors. But, as we explained in our opening brief (at 6 & n.6, 23), it should be readily apparent to the reasonable citizen or lawful resident worker that the agents are positioned at the doors not to prevent all the employees from leaving, but only to apprehend those attempting to flee, as to whom the agents have a reasonable suspicion of illegal alienage. Respondents nevertheless assert (Br. 19 n.25) that each worker in a surveyed factory is detained until he answers the agent's questions concerning his immigration status. Similarly, amici maintain (MAL-DEF Br. 10-11) that, before being allowed to exit a factory during a survey, an employee would be forced to respond to any questions posed by INS agents, and that a failure to respond might result in detention of the employee. Based on these assertions, respondents and amici contend that all workers, including citizens and lawful resident aliens, are seized during the surveys. This contention fails because its premise is erroneous. As a factual matter, none of respondents was hampered in his movements during the surveys. Indeed, the record shows that neither Delgado nor Labonte was detained or required to respond to questions when they went outside in the course of one of the surveys (J.A. 98, 135-137). Moreover, as a policy matter, INS specifically instructs each of its agents that, in order to detain an individual for inquiry into his right to enter or remain in the United States, the agent must have a reasonable suspicion that the individual is an illegal alien (J.A. 41). Thus, although we contend that a reasonable suspicion of alienage



is sufficient under the Fourth Amendment to support a brief detention in this context, the reality of the situation is that, pursuant to INS guidelines, an agent will not stop a person from exiting a factory in the course of a survey unless the agent reasonably suspects that the person is in this country illegally.

Respondents also rely (Br. 17) on the agents' "trappings of authority," including badges, handcuffs and walkie-talkies, as creating a "detentive environment."<sup>2</sup> Although the Court has suggested that the fact that an officer is not in uniform may help support a finding that his encounter with a person is not a seizure (see *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (opinion of Stewart, J.)), it does not follow that the display of a badge for identification purposes by an officer who is not in uniform, or the presence of other official equipment, necessarily converts an encounter into a seizure.<sup>3</sup> Similarly, the fact, also cited by respondents (Br. 18), that the agents did not affirmatively

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<sup>2</sup>Although respondents correctly note (Br. 4) that INS agents are armed, the agents are instructed to keep their weapons concealed (Smith Dep. 111; Clarin Dep. 109), and there is no evidence that any weapons were visible to the workers (see J.A. 83, 88, 95, 112). The agents also carry flashlights for the purpose of locating illegal aliens who attempt to hide, but, contrary to respondents' assertion (Br. 4), the agents are not trained to use the flashlights as batons (Rice Dep. 8).

<sup>3</sup>Respondents suggest (Br. 11 & n.18) that Miramontes felt compelled to cooperate with the INS agents because, if she had refused or been unable to produce her immigration papers, she would have been subject to arrest pursuant to 8 U.S.C. 1304(e). The requirement that Miramontes produce her immigration documents upon a proper request was a condition of her being admitted to this country as an alien. That condition was imposed by Congress in the exercise of its plenary powers over immigration. We note that respondents do not make any claim that this statutory requirement violates the Fourth Amendment. Miramontes' asserted fear that she might have been arrested if she had given the agents probable cause to do so hardly establishes a Fourth Amendment violation.

inform the workers that they were free to leave is not dispositive, since this Court has never suggested that such an announcement is legally required. In this regard, respondents' contention that the workers are unaware of the purpose of the agents' appearance inside the factory because no general announcement is made at the outset of the survey seems to us fundamentally inconsistent with respondents' assertion that the agents' presence is almost invariably accompanied by screams of "la migra" and the efforts of illegal aliens to flee or hide.

Respondents also contend (Br. 20) that, because some workers become nervous and most workers stop performing their work during the surveys, it follows that all of the workers are seized.<sup>4</sup> But the subjective reactions of some workers do not transform the surveys into seizures. If INS agents with arrest warrants naming specific workers entered factories to seize those workers, it is quite likely that some of the other workers present might become nervous and stop working while the arrests were in progress. It would not follow, however, that those workers would be considered to have been seized within the meaning of the Fourth Amendment.

Respondents claim (Br. 19) that, unlike a typical *Terry* stop, in which an individual is detained for a relatively brief period, workers in a surveyed factory are detained for up to

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<sup>4</sup>Contrary to respondents' assertion (Br. 10 n. 17, 20), Correa did not testify that she was personally afraid of the INS agents; rather, she claimed that other, unidentified workers reacted with fear to the surveys, although she admitted that lawful resident aliens "don't have anything to fear" (J.A. 116). Moreover, while it is possible that INS agents may mistakenly detain a lawful resident alien during a survey (see Resp. Br. 18, 20), as respondent Correa recognized, that possibility provides no objective basis for all lawfully resident workers to fear the agents. In reality, law enforcement agents sometimes do make mistakes, even when executing valid arrest warrants for named individuals; that fact, however, does not justify eliminating the power of arrest.

one or two hours. But this claim simply begs the question whether the workers are in fact "detained" at all; it is our submission that they are not. In any event, even if all of the workers may be subject to a technical "seizure" while the surveys are conducted, as we explained in our opening brief (at 25-31), such a seizure is reasonable under the Fourth Amendment. Furthermore, to the extent that workers such as respondents may be detained in the course of their individual encounters with INS agents, these encounters typically last no more than the few seconds necessary for the person to respond to one or two questions about his immigration status and, in the case of a lawful resident alien, to produce immigration documents.<sup>5</sup>

2. a. Respondents (Br. 20-26) and amici (MALDEF Br. 13-17; ACLU Br. 8-39) contend that INS factory surveys are unreasonable under the Fourth Amendment because they result in the indiscriminate seizure of the entire workforce for the duration of the surveys. But, even assuming that the manner in which the surveys are conducted can be said, in some technical sense, to effect a "seizure" of the workforce, respondents and amici simply fail to come to grips with the extreme implications of their position, which are discussed in our opening brief (at 29-31). For example, under their reasoning, it would be unlawful for the police to set up roadblocks to catch fleeing suspects, or to guard the exits of a store to apprehend criminal fugitives. We submit that these law enforcement procedures, as well as the surveys at issue here, pass muster under the principles discussed by this Court in *United States v. Martinez-Fuerte*,

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<sup>5</sup>As noted above, under INS guidelines, an agent must have a reasonable suspicion of illegal alienage in order to detain an individual for questioning. Thus, any one of respondents would have been allowed to leave the factory, and would not have been detained to answer questions about his immigration status, so long as the agents had no articulable basis for suspecting that they were in this country illegally.

428 U.S. 543 (1976). Contrary to the contentions of respondents (Br. 24-26) and amici (MALDEF Br. 14-15; ACLU Br. 50-55), the distinctions between this case and *Martinez-Fuerte* are of no constitutional significance.

First, respondents are simply incorrect in asserting (Br. 24) that the checkpoints in *Martinez-Fuerte* were the functional equivalent of the border; if such were the case, the Court undoubtedly would have based its decision on traditional border search principles. Indeed, in *United States v. Ortiz*, 422 U.S. 891 (1975), in which the Court earlier had held that automobile searches at one of the checkpoints involved in *Martinez-Fuerte* violated the Fourth Amendment in the absence of probable cause or consent, the Court specifically noted that the government did not contend that the checkpoint was the functional equivalent of the border. Second, while the Court in *Martinez-Fuerte* (428 U.S. at 561) made reference to the differences in an individual's expectations of privacy in an automobile as compared to in his house, this case—which involves no search issues—does not implicate privacy interests to any significant degree. For this reason, respondents' reliance (Br. 26) on *Ortiz*, which was a search case, is unavailing. Third, as we noted in our opening brief (at 28-29), although a traveler familiar with the highway in *Martinez-Fuerte* would not be surprised to come upon the checkpoint, he could not anticipate being selected for secondary referral, a process that involves from three to five minutes of questioning and that need not be based on any articulable grounds. While the workers in a surveyed factory do not have advance notice of a survey,<sup>6</sup>

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<sup>6</sup>Respondents suggest (Br. 3) that the INS selects factories to be surveyed on a "random[]" basis. This is incorrect. In those cases in which a warrant is obtained, a magistrate determines that there is probable cause to believe that illegal aliens will be found on the premises. As a practical matter, given the INS's scarce enforcement resources, the INS will not send its agents into the field to conduct a factory

any detention of an individual worker for questioning about his immigration status is extremely brief and is not "indiscriminate" because it must be based, at a minimum, on a reasonable suspicion of alienage.

b. Respondents (Br. 26-31) and amici (MALDEF Br. 20-21; ACLU Br. 57-59) maintain that any detention of employees during factory surveys is unreasonable because the governmental interests served by factory surveys are insubstantial. This assertion is untenable.

Respondents attempt to differentiate between enforcement of the immigration laws at the border and away from the border, and they suggest (Br. 28-29) that the nation's immigration problems would best be addressed by prohibiting employment of undocumented workers and increasing enforcement efforts along the border. To begin with, the INS is charged with enforcing the immigration laws not only at the border, but throughout the United States. In order to carry out this task, the INS conducts enforcement operations in a variety of settings, including points along the border, fixed checkpoints, and urban areas where large numbers of illegal aliens are known to settle. While it is true that the operations at the border are the most effective, that does not diminish the effectiveness of conducting surveys in factories where the workforce is reasonably believed to contain a high concentration of illegal aliens. Indeed, to the extent that foreigners contemplating illegal entry into the United States are led to expect that, once they avoid the Border Patrol they may secure employment with little or no fear of being discovered, the problems of enforcement at the

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survey without a clear indication that the factory employs a significant number of illegal aliens. Thus, even in cases in which entry is accomplished without a warrant but pursuant to the owner's consent, the factory is selected on the basis of objective criteria establishing reasonable suspicion, if not probable cause, that illegal aliens will be found there.

border will be made that much more difficult. Moreover, the decisions whether to prohibit the employment of illegal aliens or to allocate greater resources to border enforcement are policy matters for Congress, and are not before this Court.

Pointing to a so-called "revolving door effect," respondents argue (Br. 28, 30) that the Court should not approve factory surveys because some of the illegal aliens apprehended in such surveys invariably return to this country and take up their old jobs. This, we submit, is a preposterous argument; it is tantamount to saying that the Court should restrict the government's efforts to enforce the law because it can be predicted that some of those apprehended will violate the law again. In this regard, it is important to recognize that "the thousands of members of our community who have been uprooted as a result of the surveys," to whom respondents refer (Br. 30), are illegal aliens who have no legal right to remain in this country and who, accordingly, have been deported or permitted to leave voluntarily under the threat of deportation.

3. Respondents (Br. 31-33) and amici (MALDEF Br. 13; ACLU Br. 55 n.30) contend that this Court's decisions in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), and *United States v. Cortez*, 449 U.S. 411 (1981), compel the conclusion that INS agents may not stop and question a person about his immigration status unless they have a particularized reasonable suspicion of illegal alienage with respect to that person. Accordingly, they argue that the individual encounters between INS agents and workers during factory surveys constitute unlawful seizures because it is conceded that the agents do not have reasonable suspicion of illegal alienage with respect to every worker questioned in the course of a survey. In our opening brief (at 34-35), we argued that these encounters do not involve a seizure at all, and thus are not subject to the Fourth



Amendment. Even if the encounters may be viewed as seizures, however, for the reasons stated in our opening brief (at 34-44), respondents and amici err in contending that they must be supported by a reasonable suspicion of illegal alienage with respect to each individual encountered.

Moreover, respondents' and amici's reliance on *Brignoni-Ponce* and *Cortez* is misplaced. As respondents themselves acknowledge, the Court in *Brignoni-Ponce* (422 U.S. at 884 n.9) specifically reserved the question whether, outside the automobile context, INS officers "may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country." Contrary to respondents' assertion, the decision in *Cortez* did not answer the question reserved in *Brignoni-Ponce*. The specific question under consideration in *Cortez* was "whether objective facts and circumstantial evidence suggesting that a particular vehicle is involved in criminal activity may provide a sufficient basis to justify an investigative stop of that vehicle." 449 U.S. at 412-413. In answering that question in the affirmative, the Court cited some of its prior cases, including *Brignoni-Ponce*, for the proposition that, in the context of a criminal investigation, an investigatory stop must be founded upon a reasonable suspicion that the person stopped is engaged in criminal activity. 449 U.S. at 417-418. But because *Cortez*, like *Brignoni-Ponce*, involved a stop of a vehicle undertaken as part of an investigation into criminal activity (smuggling of illegal aliens), the Court in *Cortez* had no reason to focus specifically on the question left open in *Brignoni-Ponce* — i.e., the permissibility of stopping a suspected alien for purposes of inquiring into his immigration status as part of a noncriminal enforcement program in a pervasively regulated area. In an analogous context, the Court has held that administrative searches and seizures of highly regulated businesses need not be



justified by information concerning criminality. Accordingly, the decision in *Cortez* cannot be viewed as having settled the question reserved in *Brignoni-Ponce*.

Respondents (Br. 33-35) and amici (MALDEF Br. 4-5, 23-24) assert that a reasonable suspicion of alienage alone, without a requirement of illegal alienage, would result in unlawful detentions of individuals for questioning because the only objective criterion on which such encounters would be based is ethnic physical appearance, which this Court has held is insufficient to justify an investigative detention. See *United States v. Brignoni-Ponce*, 422 U.S. at 886. Accordingly, respondents and amici contend that an alienage standard would lead to discrimination against citizens and resident aliens of Hispanic origin. This contention is without merit.<sup>7</sup>

In the first place, although ethnic physical appearance is *one* factor, among others, that an INS agent is instructed to consider in determining whether he has a reasonable suspicion that a particular person is an alien, the INS specifically informs its officers that ethnic appearance is not enough, standing alone, to satisfy that standard. See J.A. 37-38. Thus, under INS guidelines, the officer must look to other particular characteristics or circumstances (such as foreign manner of dress or grooming and apparent inability to speak English) that give rise to a reasonable suspicion of alienage. Moreover, the factors listed in the INS guidelines are to be viewed together and not in isolation (see *United States v. Cortez*, *supra*), and they are, in any case, merely illustrative and not exhaustive.

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<sup>7</sup>We note that respondents (Br. 42-43) and amici (MALDEF Br. 25-29) also argue that the factory surveys are conducted in a manner that violates the equal protection component of the Due Process Clause of the Fifth Amendment. Neither the court of appeals nor the district court addressed this issue, which was not litigated below (Pet. App. 7a-8a n.7), and the argument appears to be insubstantial in any event.

Furthermore, it is difficult, if not impossible, in our view, to determine in the abstract whether a particular set of factors may serve as a proper basis for stopping and questioning an individual about his right to be or to remain in the United States. The record in this case does not focus on the agents' grounds for questioning any particular person regarding his immigration status. As the court of appeals noted (Pet. App. 41a), any determination whether the appropriate standard for detaining an individual has been met presents essentially "a factual question to be resolved on a case-by-case basis." Therefore, we submit that the question whether an agent is capable of making a proper reasonable suspicion-of-alienage determination should await a case that presents that question in the focused context of a particular encounter.

Nor is there any basis to the claim that an alienage standard in effect would discriminate against citizens and resident aliens of Hispanic ancestry. It is readily apparent that the particular ethnic characteristics that may support a determination of a reasonable suspicion of alienage in a given case will vary, depending on geographic location and the specific nature of the tip. Thus, where the INS receives information about a large concentration of illegal aliens from the West Indies, or Poland, or Nigeria, the agents will focus their investigative efforts on persons exhibiting the ethnic physical appearance, language, dress and other characteristics of the particular ethnic group involved. In short, there is no danger that an alienage standard, as such, would result in unwarranted discrimination against any particular racial or ethnic group.

4. Respondents (Br. 38-40) and amici (MALDEF Br. 13-16; ACLU Br. 29-38) appear to contend that a number of this Court's decisions establish that the Fourth Amendment

imposes an irreducible requirement of individualized suspicion. This Court held precisely to the contrary in *Martinez-Fuerte*, however, and the cases relied upon by respondents and amici do not support their position.

The issue presented in *Ybarra v. Illinois*, 444 U.S. 85 (1979), concerned the permissibility of the search of a patron of a public tavern by police officers executing a search warrant at the tavern. As this Court noted in *Michigan v. Summers*, 452 U.S. 692, 695-696 n.4 (1981), "[n]o question concerning the legitimacy of the detention was raised. Rather, the Court concluded that the search of Ybarra was invalid because the police had no reason to believe he had any special connection with the premises, and the police had no other basis for suspecting that he was armed or in possession of contraband." Here, as in *Summers*, only the detention is at issue.<sup>8</sup>

This Court's decision in *Brown v. Texas*, 443 U.S. 47 (1979), is clearly inapposite. There, the police stopped and frisked an individual in a public alley on the ground that he "looked suspicious" and had never before been seen in the area, which was known as having a high incidence of drug traffic. *Brown*, and other cases involving stops of single individuals in public places, simply did not address the issue posed here, which is whether law enforcement officers may detain a group of individuals in a particular location when they have a reasonable suspicion that a substantial percentage of the individuals in that group are engaged in criminal conduct.<sup>9</sup> As we argued in our opening brief (at 40-44),

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<sup>8</sup>*Sibron v. New York*, 392 U.S. 40, 62-63 (1968), and *United States v. Di Re*, 332 U.S. 581 (1948), also are not on point because they too involved searches, rather than mere detentions, of suspected individuals.

<sup>9</sup>*Davis v. Mississippi*, 394 U.S. 721 (1969), is also inapposite for similar reasons. In that case, based on a rape victim's description of her assailant as a black youth, police rounded up at least 24 black youths

there is no reason why the basis for suspicion must be "individualized" in the latter context.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE  
*Solicitor General*

DECEMBER 1983

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and brought them to police headquarters for questioning and fingerprinting. The investigatory detentions, which were unsupported by reasonable suspicion, let alone probable cause, were clearly unlawful. But *Davis*, like *Brown*, involved the actual seizures of single individuals, rather than the constructive or hypothetical detention at a single location of a discrete group, some unidentified members of which are reasonably suspected of criminal activity.

FILED

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ALEXANDER L. STEVENS,  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

—v.—

*Petitioners,*

HERMAN DELGADO, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF FOR THE  
AMERICAN CIVIL LIBERTIES UNION  
AS AMICUS CURIAE  
IN SUPPORT OF AFFIRMANCE**

DAVID M. BRODSKY  
AEGIS J. FRUMENTO  
E. SCOTT GILBERT  
RONALD A. SARACHAN  
PETER DEL VECCHIO

Schulte Roth & Zabel  
460 Park Avenue  
New York, New York 10022  
(212) 758-0404

BURT NEUBORNE, *Counsel of Record*  
CHARLES S. SIMS

American Civil Liberties Union  
Foundation  
132 W. 43rd Street  
New York, New York 10036  
(212) 944-9800

*Counsel for Amicus Curiae*

## TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICUS CURIAE.....	1
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	8
I. THE FOURTH AMENDMENT PROHIBITS THE INS FROM USING AREA CONTROL OPER- ATIONS TO SEIZE PERSONS WHO ARE NOT PARTICULARLY SUSPECTED OF WRONGDOING.....	8
A. The Fourth Amendment Was Drafted to End a His- tory of Seizures Not Based on Individual Suspicion.....	13
B. The INS In Its Area Control Operations Exercises Unconstitu- tionally Broad Discre- tion to Seize Persons Not Particularly Sus- pected of Wrongdoing.....	22
II. THE FACTORY RAIDS CANNOT BE JUSTIFIED AS AN EXCEPTION TO THE REQUIREMENT OF INDIVI- DUALIZED SUSPICION UNDER THE FOURTH AMENDMENT.....	39

	<u>Page</u>
A. The Factory Raids Cannot Be Justified as Adminis- trative Inspections.....	40
B. The Factory Raids Cannot Be Justified as Investi- gatory Stops Near the Border.....	49
CONCLUSION.....	60

### TABLE OF AUTHORITIES

#### CASES:

	<u>Page</u>
Almeida-Sanchez v. United States, 413 U.S. 266 (1973).....	25, 26
Babula v. INS, 665 F.2d 293 (3rd Cir. 1981) .....	4
Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211 (D.C. Cir. 1981) <u>cert. denied</u> , 455 U.S. 940 (1982).....	4
Boyd v. United States, 116 U.S. 616 (1886).....	19
Brinegar v. United States, 338 U.S. 160 (1949).....	26
Brown v. Texas, 443 U.S. 47 (1979).....	26, 30 31



Camara v. Municipal Court, 387 U.S. 523 (1967).....	<u>passim</u>
Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).....	41, 44
Davis v. Mississippi, 394 U.S. 721 (1969).....	33, 34
Delaware v. Prouse, 440 U.S. 648 (1979).....	<u>passim</u>
Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), <u>mod.</u> , 631 F.2d 91 (7th Cir. 1980), <u>cert. denied</u> , 451 U.S. 1022 (1982).....	36
Donovan v. Dewey, 452 U.S. 594 (1981).....	41, 42 47
Dunaway v. New York, 442 U.S. 200 (1979).....	35
English v. Sava, No. 80 Civ. 1521 (MEL), Slip op. (S.D.N.Y. Sept. 22, 1983).....	4
Entick v. Carrington, 19 Howell's State Trials 1029 (1765).....	19, 20
Florida v. Royer, 51 U.S.L.W. 4293 (U.S. Mar. 23, 1983) (No. 80-2146).....	54
Frank v. Maryland, 359 U.S. 360 (1959).....	44
Huckle v. Money, 2 Wils. K.B. 206 (1763).....	18

ILGWU v. Sureck, 681 F.2d 624 (9th Cir. 1982).....	11
Illinois Migrant Council v. Pilliod, 398 F. Supp. 882 (N.D. Ill. 1975), <u>aff'd</u> , 540 F.2d 1062 (7th Cir. 1976).....	4
Lee v. INS, 590 F.2d 497 (3d Cir. 1979).....	4
Marquez v. Kiley, 436 F. Supp. 100 (S.D.N.Y. 1977).....	4
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).....	<u>passim</u>
Michigan v. Summers, 452 U.S. 692 (1981).....	35, 37 56
Olmstead v. United States, 277 U.S. 438 (1928).....	1
Payton v. New York, 445 U.S. 573 (1980).....	14
See v. City of Seattle, 387 U.S. 541 (1967).....	40-41
Sibron v. New York, 392 U.S. 40 (1968).....	35
Terry v. Ohio, 392 U.S. 1 (1968).....	9, 11, 53, 54
Texas v. Brown, 51 U.S.L.W. 4361 (U.S. April 19, 1983) (No. 81-419).....	52
United States v. Biswell, 406 U.S. 311 (1972).....	41, 42 44, 45

United States v. Brignoni-Ponce, 422 U.S. 873 (1975).....	<u>passim</u>
United States v. Cortez, 449 U.S. 411 (1981).....	37, 55
United States v. Di Re, 332 U.S. 581 (1948).....	35
United States v. Martinez-Fuerte, 428 U.S. 543 (1976).....	<u>passim</u>
United States v. Mendenhall, 446 U.S. 544 (1980).....	9, 32
United States v. Place, 51 U.S.L.W. 4844 (U.S. June 20, 1983) (No. 81-1617)....	53
United States v. Villamonte- Marquez, 51 U.S.L.W. 481 (U.S. June 17, 1983).....	59
Warden v. Hayden, 387 U.S. 294 (1967).....	14
Wilkes v. Wood, 19 Howell's State Trials 1153 (1763).....	19
Ybarra v. Illinois, 444 U.S. 85 (1979).....	34-35
Zepeda v. INS, 708 F.2d 355 (9th Cir. 1983).....	4

#### UNITED STATES CONSTITUTION:

Amend IV.....passim

## STATUTES:

29 U.S.C. § 657(a).....	46
8 U.S.C. § 1357(a)(1).....	47

## OTHER AUTHORITIES:

J. Adams, <u>The Life and Works of John Adams</u> .....	17
H. Gray, <u>Appendix I Quincy's Reports of Massachusetts Bay, 1761-1772</u> .....	16
Landynski, <u>Search and Seizure and the Supreme Court</u> (1966) .....	14, 18
M. Hale, <u>History of the Pleas of the Crown</u> (1847).....	15
N. Lasson, <u>The History and Development of the Fourth Amendment to the United States Constitution</u> (1937).....	14, 18 21
Hearing on Undocumented Aliens Before the Subcommittee of the Department of State, Justice & Commerce, the Judiciary, and Related Agencies, 95th Cong. 2d Sess. 324 (1978).....	44
United States Department of Justice, <u>Monthly Report of Deportable Aliens Found in the U.S. By Nationality. Status at Entry</u> (fiscal year 1982).....	57
Center for U.S. - Mexican Studies, University of California - San Diego, <u>Overview of Activities 1980-1983</u> (July 1983).....	58

## INTEREST OF AMICUS CURIAE<sup>1</sup>

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to defending the principles of personal freedom embodied in the Bill of Rights.

Among those freedoms is the right to be secure from unreasonable government seizures. The Fourth Amendment erects a critical barrier between the government and all persons on our soil, conferring upon us, "as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In an era of recurring tension between that right and popular demands for more effective law

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<sup>1</sup> Letters of consent to the filing of this brief have been obtained from the parties and filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

enforcement, the amicus has consistently urged this Court to resist the erosion of that basic liberty.

In this case, the Immigration and Naturalization Service (the "INS") argues that it should be permitted to detain masses of persons for questioning, not on the basis of individualized suspicion, but solely on the basis of their geographical location and ethnic background. Such dragnet activity is unfaithful not only to the language of the Fourth Amendment, but to its history and spirit. Mass detentions, in which individual persons detained are not themselves suspected of any wrongdoing, are wholly antithetical to our constitutional heritage.

Accordingly, the amicus urges this Court to affirm the decision of the Ninth Circuit, which found that mass detentions

without individualized suspicion violate the Fourth Amendment.

STATEMENT OF THE CASE

In this action, the INS seeks the unprecedented constitutional authority to detain all persons found at geographic locations where it suspects there may be some undocumented aliens, without any particularized suspicion that any of the persons seized are actually present in the United States illegally.

While the INS calls these mass detentions "area control operations," they are not merely border inspections of the kind which this Court has previously considered. Rather, they are carried out throughout the United States: in factories; in urban neighborhoods; on public



transportation.<sup>2</sup> Nor are they brief stops of motor vehicles for cursory questioning of passengers; they are seizures of entire work forces lasting up to two hours, while INS agents conduct systematic interrogations of workers of one ethnic background.

The specific area control operations at issue here are three raids which the INS conducted at factories in Southern California in 1977.

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2 The INS appears routinely to seize unsuspecting and unsuspected persons not only in workplaces (see Babula v. INS, 665 F.2d 293 (3rd Cir. 1981); Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1982)), but also on the public streets (see Marquez v. Kiley, 436 F. Supp. 100, 104 (S.D.N.Y. 1977); Illinois Migrant Council v. Pilliod, 398 F.Supp. 882, 887 (N.D. Ill. 1975), aff'd, 540 F.2d 1062 (7th Cir. 1976); rehearing en banc, 548 F.2d 715 (7th Cir. 1977); Lee v. INS, 590 F.2d 497, 498 (3rd Cir. 1979)), on common carriers (see English v. Sava, No. 80 Civ. 1521 (S.D.N.Y. Sept. 22, 1983)), and in homes and sleeping quarters (see Zepeda v. U.S. INS, 708 F.2d 355, 357-58, 364-65 (9th Cir. 1983); Illinois Migrant Council v. Pilliod, supra, 398 F. Supp. at 888-91.

In each of the raids described in the record, armed agents of the INS descended upon a factory, displaying intimidating trappings of authority: handcuffs, badges, and electronic communications equipment. J.A. 78, 83, 150. In some of the raids, the agents were accompanied by officers from the Los Angeles Police Department. J.A. 91-92, 111. Upon arriving at a factory, INS agents immediately secured the exits of the building and prevented workers who attempted to leave from doing so. J.A. 82, 158.<sup>3</sup>

Agents then commenced the systematic row-by-row interrogation of persons employed at the factory, concentrating on

- 3 As Herman Delgado testified: "First thing I saw was people running, and I heard a couple of people say 'the immigration' in Spanish so I started looking up toward the front and then I seen people with badges being stationed by the doors. They wouldn't let nobody out." (J.A. 82). Francesca Labonte testified that "they were blocking everybody inside." (J.A. 146).

workers of Latin descent while ignoring employees of other racial and ethnic characteristics. E.g., J.A. 86. As agents systematically swept through the factory to conduct their interrogations, work generally came to a halt as supervisors attempted to reassure surprised and anxious employees. J.A. 89, 107, 116. The interrogations lasted for up to two hours. As the government concedes, INS agents did not hesitate to use force in order to effect arrests. J.A. 78, 141-42.

#### SUMMARY OF ARGUMENT

The mass seizures at issue herein impermissibly violate the Fourth Amendment.

First, notwithstanding the government's assertions to the contrary, the facts of this case clearly show that each

person in the targeted factories was seized within the meaning of the Fourth Amendment when the INS sealed off the exits during its factory raids. The INS's restriction of the workers' freedom to leave, both actually and by an intimidating show of force, constituted such an intrusion upon the personal liberty and security of those workers as to be a "seizure" under any reading of this Court's decisions.

Second, the mass seizures are unreasonable under the Fourth Amendment because they are not based on any articulable suspicion that particular persons were aliens illegally in this country. The requirement that no person be seized unless he is particularly suspected of wrongdoing is necessary to constrain the exercise of discretion by government agents in the field, to protect innocent persons from governmental intrusion, and

to prohibit the exercise of arbitrary government power. That is shown by the historical context in which the Fourth Amendment was conceived and adopted, and by this Court's own decisions (a) requiring particularized suspicion as a predicate to a seizure and (b) decrying the use of mass detentions in other contexts.

Finally, the intrusion upon personal liberties engendered by the INS's area control operations is so great that it cannot be justified on any of the narrow grounds upon which this Court has in the past relaxed the standard of strict particularized suspicion.

# I

THE FOURTH AMENDMENT PROHIBITS THE INS FROM USING AREA CONTROL OPERATIONS TO SEIZE PERSONS WHO ARE NOT PARTICULARLY SUSPECTED OF WRONGDOING

When INS agents descended upon the factories and sealed off their exits for

several hours, each employee was "seized" within the meaning of the Fourth Amendment. Under the standards adopted by this Court, a seizure occurs when a government agent "accosts an individual and restrains his freedom to walk away," Terry v. Ohio, 392 U.S. 1, 16 (1968), or when "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980). Under these standards it is clear that a seizure occurred in this case. The workers were physically detained; given the manner in which the INS entered, any reasonable person would believe, as did

the workers (supra at p.5 n.3), that he was not free to leave.<sup>4</sup>

At the time of the seizure, however, INS agents had no reason to suspect that Mr. Delgado and the other individual respondents were aliens at all, much less aliens illegally in the United States. INS agents harbored merely a generalized

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<sup>4</sup> The government argues that the liberty of the workers was restrained "only in a theoretical sense," since at the times when the raids were conducted "employees presumably were obligated to their employer to be present at their work stations" and consequently were not "free to leave." (Pet. Br. at 23). It is quite clear from the record, however, that the restraints on liberty which were imposed by the INS agents were far from "theoretical." INS agents repeatedly prevented persons from leaving factory areas (J.A. 82-83); and they admitted that any person who attempted to leave a factory location would be pursued and stopped (J.A. 158). Whatever the economic consequences might have been, on a normal working day, for a worker who left his position during working hours, he was nevertheless always free to walk away. In a free society, that is his privilege. When INS agents secured the factories' exits, that liberty was extinguished.



suspicion that an unknown number of workers might be illegal aliens.<sup>5</sup>

Under the Fourth Amendment, the state may not restrain the liberty of any person for an appreciable length of time unless there are specific articulable reasons to subject that particular person to such treatment. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." Terry v. Ohio, supra, 392 U.S. at 21 n. 18.

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<sup>5</sup> The INS entered the factories pursuant either to the owners' consent or warrants to search the premises for "property, namely persons, namely illegal aliens." ILGWU v. Sureck, 681 F.2d 624, 627 n.5 (9th Cir. 1982). As the government conceded below and as the Ninth Circuit found, id. at 629 n.8, the owners' consent and the non-specific search warrants gave the INS agents only the authority to pass the factory gates onto the owners' property. They could not have divested the individual worker of his Fourth Amendment right to be free from unreasonable seizures. See Delaware v. Prouse, 440 U.S. 648, 663 (1979), citing Terry v. Ohio, 392 U.S. 1 (1968).

That "central teaching" -- the particularity requirement -- is a product of the Colonists' resentment of and hatred for British practices by which government officers could search geographical areas and seize persons virtually at will. They adopted the Fourth Amendment to prevent precisely the type of general search which is at issue herein.

The INS argues that, notwithstanding the Fourth Amendment, it may seize any person, not on the basis of particularized suspicion, but merely because he is present in a suspicious place. However, the history of the Fourth Amendment and the decisions of this Court make clear that a person's mere presence in a suspicious geographical location is not

of itself a permissible reason to seize and interrogate that person.<sup>6</sup>

A.    The Fourth Amendment Was Drafted to End a History of Seizures Not Based on Individual Suspicion

The Fourth Amendment was adopted explicitly to protect persons against the government's ability to seize them and their property in the absence of particularized suspicion. It was the Framers' institutional reaction to the Crown's oppressive general warrants and writs of assistance, which permitted the seizure

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6    Since the INS did not even have reasonable suspicion to suspect any person seized of wrongdoing, it is unnecessary to discuss whether the higher standard of probable cause should be required as a predicate to these operations.

of persons and things not particularly named and described.<sup>7</sup>

The unfettered discretion to search and seize which the writs and warrants gave to government officers inevitably led to harassment of the innocent. Although ineffectual to stem the use of general warrants until the eighteenth century, the English common law had long recognized and sought to protect against their abuses. Eminent seventeenth cen-

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7 The writs of assistance issued during the Colonial Period amounted to "roving commissions" empowering their holders to conduct exploratory searches for contraband. The general warrants, used contemporaneously in England, permitted the seizure of unspecified persons connected with printing seditious libel.

See generally N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution, 37-49, 51-75 (1937) (hereafter "Lasson"); Landynski, Search and Seizure and the Supreme Court, 21-37 (1966) (hereafter "Landynski").

Both Lasson and Landynski have been frequently relied upon by this Court. See, e.g., Payton v. New York, 445 U.S. 573, 583 n.21 (1980); Warden v. Hayden, 387 U.S. 294, 301 n.9 (1967).

tury jurists sought to limit the scope of warrants to particularly named places, things and persons. For example, Chief Justice Hale, in his History of the Pleas of the Crown, declared that warrants to search any unspecified places for stolen goods were invalid and should be restricted to permit search only in particular places, and then only after a showing, upon oath, of the probable cause to the satisfaction of a magistrate.<sup>8</sup>

In the Colonies, the general warrants to search and seize took the form of the Colonial writs of assistance. Those writs conferred upon customs officers unlimited discretion to search for smuggled goods, and permitted them to enter and search homes and businesses at

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<sup>8</sup> Lasson, supra note 7, at 35-37; Landynski, supra note 7, at 26-27, both citing Sir Matthew Hale, History of the Pleas of the Crown (1847).

will, even with no suspicion that smuggled goods were to be found.<sup>9</sup>

In 1761, in what has come to be known as The Writs of Assistance Case, sixty-three Boston merchants unsuccessfully petitioned the Superior Court of Massachusetts to deny the grant of new writs of assistance to Paxton, a customs official. In his famous argument, James Otis, representing the merchants, focused on the writs' lack of specificity and argued that the statutory language authorizing the writs should be construed to permit the issuance of special writs only; he called the general warrant "the worst instance of arbitrary power, the

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9 The most authoritative account of the writs of assistance in the Colonies is the work by Horace Gray, Jr. (later Chief Justice of Massachusetts and Justice of this Court), which constitutes Appendix I of Quincy's Reports of Massachusetts Bay, 1761-1772, at. 395-540.

most destructive of English liberty, that ever was found in an English law book."<sup>10</sup>

After the Writs of Assistance Case, the English common law courts declared mass seizures pursuant to general warrants illegal, and held persons acting under them liable for trespass and false imprisonment. The most famous cases involved John Wilkes, renegade member of Parliament and anonymous author of the seditious North Briton, which regularly criticized the King, his ministers and the policies of government. After he published Number 45, a particularly nettlesome piece critical of the King, the government issued a broad warrant to search for and seize the unknown authors, printers and publishers of The North Briton, No. 45. Much as the INS did here, the King's messengers proceeded to

<sup>10</sup> J. Adams, Life and Works of John Adams, Vol. II, at 523, reprinted in Landynski, supra note 7, at 34.



arrest forty-nine persons in three days in their search for the culprits. They eventually arrested Wilkes.<sup>11</sup>

In one of the several resultant proceedings, Chief Justice Pratt declared the warrants illegal, stating, "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour."<sup>12</sup> In deciding Wilkes's own suit for trespass against the bearers of the warrant, Pratt again decried the warrants' lack of particularity:

The defendants claimed a right under precedents to force persons' houses, break open escritiores, seize their papers, upon a general warrant, where no inventory is made of the things taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wher-

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<sup>11</sup> Lasson, supra note 7, at 43-44; Landynski, supra note 7, at 28.

<sup>12</sup> See Huckle v. Money, 2 Wils. K. B. 206, 95 Eng. Rep. 768 (1763).

ever their suspicion may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this Kingdom, and is totally subversive of the liberty of the subject.<sup>13</sup>

Several years later, as reported in the oft-cited case, Entick v. Carrington, 19 Howell's State Trials 1029 (1765), another warrant was challenged which was specific as to the person to be searched but general as to the papers to be seized. In an opinion which this Court has recognized as a landmark of English liberty,<sup>14</sup> Pratt, now Lord Camden, again focused on the issue of particularity, noting that since the government claimed broad power to engage in non-particularized general searches, "one should naturally expect that the law to

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<sup>13</sup> Wilkes v. Wood, 19 Howell's State Trials 1153, 1167, 98 Eng. Rep. 489 (1763) (emphasis added), reprinted in Lasson, supra note 7, at 45.

<sup>14</sup> Boyd v. United States, 116 U.S. 616, 626 (1886).

warrant it should be as clear in proportion as the power is exorbitant."<sup>15</sup> Lord Camden found no law to warrant the government's power.

In the Colonies, opposition to writs of assistance continued to spread beyond Boston with the passage of the Townshend Revenue Act of 1767, which authorized the issuance of writs of assistance throughout the Colonies. In the aftermath of North Briton and Entick, Colonial judges generally refused to grant applications for writs of assistance under the Act, despite persistent pressure by British officials.<sup>16</sup> The Colonists followed with

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<sup>15</sup> Entick v. Carrington, *supra*, reprinted in Lasson, *supra* note 7, at 18.

<sup>16</sup> Massachusetts and New Hampshire had standing writs prior to the 1767 initiative. No record exists of applications for the Townshend writs to have been made in either New Jersey or in North Carolina. However, the Townshend Act applications caused the writ of assistance controversy to develop acutely in Rhode Island, Connecticut, New York, Pennsylvania, Maryland, East Florida, Georgia, South Carolina, and Virginia.

interest the government's attempts to obtain the new writs, and ultimately responded with the petition which the Continental Congress addressed to George III on October 24, 1774, requesting the redress of customs officers' unlimited power to engage in general searches.<sup>17</sup>

The Fourth Amendment was presaged by the provisions that seven of the original Colonies, in direct reaction to the British customs practices, incorporated into their state constitutions.<sup>18</sup> All of them condemned any grant to the government of authority to seize "any" person or persons not specifically named.<sup>19</sup> Those state constitutional provisions, and in particular the provisions from the

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<sup>17</sup> Lasson, supra note 7, at 75.

<sup>18</sup> Virginia, Pennsylvania, Maryland, North Carolina, Vermont, Massachusetts and New Hampshire.

<sup>19</sup> Lasson, supra note 7, at 79-82 (collecting relevant portions of state constitutions).

Virginia, Pennsylvania and Massachusetts constitutions, were the precedents for the Fourth Amendment.

On June 8, 1789, James Madison, drawing on the experience of the state constitutions, presented his proposals for the Fourth Amendment to the United States Constitution to Congress. The final version of the Amendment was delivered from Congress for state ratification in its current two clause form. All drafts shared the final version's prohibition of warrants issued without probable cause and not particularly describing the persons to be seized.

- B. The INS In Its Area Control Operations Exercises Unconstitutionally Broad Discretion to Seize Persons Not Particularly Suspected of Wrongdoing.

History clearly evidences that the dangers posed by blanket, general warrants were foremost in the Framers' minds when they drafted the Fourth

Amendment. They considered general warrants manifestly unreasonable and explicitly outlawed them. Nevertheless, the INS argues to this Court that it is "reasonable" for the government to seize a person, without warrant, whom it has no reasonable basis to believe has done anything wrong, if that person is merely present in a place suspected of harboring some illegal aliens.

The factory raids pose two distinct challenges to basic Fourth Amendment rights. First, they are indiscriminate; they depend upon a governmental power to seize innocent persons in the pursuit of the guilty. In every factory raid, the government seizes and detains dozens of innocent persons -- persons whom the government has no reason to believe are anything but law-abiding citizens or resident aliens. The government thus casts its net too broadly. The

individual becomes only a part of a group, and personal liberties are lost.

The second challenge posed by factory raids to Fourth Amendment rights is their selectivity. Having sealed off a factory and cut off all the persons inside, the INS agents are free to roam through the building, picking out those persons whom they will let alone and those they will pursue.

The extension of such unbridled discretion to INS agents in the field is particularly disturbing because their actions are often triggered by the detainees' ethnic appearance or their presence in ethnic enclaves. It appears from the record that the respondents here were interrogated by INS agents primarily because they are Hispanic. Needless to say, race and ethnicity are impermissible bases on which to detain and interrogate a person, United States v. Brignoni-

Ponce, 422 U.S. 873, 885-87 (1975).

The particularity requirement of the Fourth Amendment acts to restrain both indiscriminate government intrusions and improper selectivity. First, discretion is easily abused during area control operations because large numbers of people are indiscriminately seized and agents are then free to choose among them. This discretion is substantially reduced when enforcement officers must have a basis for suspecting an individual prior to seizing him. See, e.g., Delaware v. Prouse, 440 U.S. 648, 661 (1979); Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973).

Second, the particularity requirement limits government intrusion those person who are legitimate targets of investigation. In this sense, it is a rule that protects the innocent by preventing the government from assuming



guilt by association or guilt by mere physical presence. See, e.g., Brown v. Texas, 443 U.S. 47, 51-52 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975).

Finally, the particularity requirement prevents government from exercising powers that are abhorrent to a free society. In Almeida-Sanchez v. United States, 413 U.S. 266 (1973), this Court recalled the words of Justice Jackson, soon after his return from the Nuremberg Trials:

"These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."

Id. at 274 (quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)).

In recent years, while recognizing the needs of law enforcement programs, this Court has rebuffed attempts to destroy the particularity mandate of the Fourth Amendment. It has invalidated practices which would permit the random detention of persons absent reasonable, particularized suspicion, and it has similarly rejected attempts to base reasonable suspicion on the mere fact that a person may be present in a geographical area where illegal activity occurs.

For example, this Court has ruled that except at permanent fixed checkpoints,<sup>20</sup> drivers and occupants of automobiles may not be stopped, detained and questioned unless they are reasonably and particularly suspected of wrongdoing. One of the first cases in which that principle was announced involved

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<sup>20</sup> See United States v. Martinez-Fuerte, 428 U.S. 543 (1976), discussed infra at 49-53.

another INS tactic -- the so-called "roving patrol." In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), this Court held that, except at the border or its functional equivalent, the INS "may stop vehicles only if . . . [its officers] are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." Id. at 884 (footnote omitted).

Similarly, in Delaware v. Prouse, 440 U.S. 648 (1979), this Court again spoke against detaining drivers without particularized suspicion. In Prouse, a state patrolman stopped the respondent's car, ostensibly to check the driver's license and registration, solely because the patrolman had nothing else to do. Id. at 650-51. This Court, recog-

nizing the danger to Fourth Amendment rights posed by such arbitrary invasions of personal privacy, held again that

except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment."

Id. at 663.

However, the INS nonetheless suggests that if it suspects that some illegal aliens will be found in a factory, then it can detain all the factory workers for questioning (Pet. Br. at 41). The INS thus urges that a person may be seized simply because he happens to be in the wrong place at the wrong time, with no regard paid to whether he is himself suspect. The INS argues, in effect, that the Fourth Amendment permits a lesser degree of guilt by association -- suspi-

cion by association.

This Court, however, has consistently rejected both the concept of "suspicion by association" and its close cousin, "suspicion by statistical inference." For example, the INS urged unsuccessfully in Brignoni-Ponce, supra, 422 U.S. 873 (1975), that stopping an automobile whose occupants appeared to be Mexicans was justified by the statistical fact that many Mexicans are in the country illegally. This court ruled, quite properly, that Mexican ancestry does not in itself warrant a suspicion of wrongdoing. "The likelihood that any given person of Mexican ancestry is an alien . . . standing alone . . . does not justify stopping all Mexican-Americans to ask if they are aliens." Id. at 886-87.

Similarly, in Brown v. Texas, 443 U.S. 47 (1979), this Court held that a

police officer could not stop and question a person solely because he was present in an area having a high incidence of drug traffic. This Court "required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. . . . The fact that the appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." Id. at 51-52 (emphasis added).

In short, government officers must have a reasonable suspicion that the particular person to be detained for questioning is engaged in unlawful activity, and cannot base that suspicion merely upon a person's membership in a "high-risk" ethnic or other group<sup>21</sup> or

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<sup>21</sup> A more difficult example arises when persons (footnote continued)

presence in a place where unlawful activity is known to take place.

It is clear, therefore, that dragnet searches of the sort that the INS conducted here, in which large groups of persons who cannot possibly be individually suspected of unlawful conduct are detained en masse and subjected to scrutiny, are impermissible under our Constitution. Although this may be the first case to reach this Court involving mass detentions of such large numbers of innocent persons in order to ferret out a

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are detained because they fit the so-called "drug courier profiles" now used in major airports to detect transporters of narcotics. Although this Court has yet to review a case in which a person was seized solely because he fit the profile, Justice Powell, in his concurring opinion in United States v. Mendenhall, 446 U.S. 544 (1980) in which Chief Justice Burger and Justice Blackmun joined, doubted that a person could be detained for questioning and search solely on the basis of the drug profiles statistics. "I do not believe that these statistics establish by themselves the reasonableness of this search. Nor would reliance upon the 'drug courier profile' necessarily demonstrate reasonable suspicion." Id. at 565 n.6.

few unknown guilty persons, this Court has not countenanced the use of similar tactics in the past.

In Davis v. Mississippi, 394 U.S. 721 (1969), the police, in the course of investigating a rape, rounded up scores of black youths and detained them for questioning and fingerprinting before releasing them. The fingerprints obtained were sent to the FBI for comparison with prints found at the scene of the crime. One such youth was ultimately charged with the crime and convicted on the basis of fingerprint evidence. This Court held that the fingerprint evidence obtained from the petitioner was inadmissible, because it was obtained by an unlawful seizure. The Court sharply criticized the mass detentions employed by the police:

Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention.



Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions."

Id. at 726-27 (footnote omitted).

This Court also criticized the mass detention that occurred in Ybarra v. Illinois, 444 U.S. 85 (1979). In Ybarra, police armed with a warrant to search a bar and its bartender proceeded to detain and "frisk" the patrons as well. The appellant was charged and convicted of possessing narcotics on the basis of evidence found in the course of the search. This Court held that the police had no right to detain the patrons of the bar, none of whom they could reasonably suspect of being engaged in wrongdoing, solely on the basis of their presence in the bar:

[T]he agents knew nothing in particular about Ybarra, except that he was present, along with several other customers, in a public tavern at a

time when the police had reason to believe that the bartender would have heroin for sale.

. . . But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v. New York, 392 U.S. 40, 62-63 [1968]. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91.<sup>22</sup> See also United States v. Di Re, 332 U.S. 581 (1948) (mere presence in the same automobile with persons

<sup>22</sup> It should be noted that, unlike in Ybarra, and despite the amount of discretion that the INS exercises in seizing and interrogating persons through its area control operations, the INS usually does not even demonstrate to a magistrate that probable cause sufficient to obtain a warrant exists to believe that the places where it wishes to conduct interrogations harbor some number of illegal aliens. (J.A. 47). See Michigan v. Summers, 452 U.S. 692, 696-97 (1981); Dunaway v. New York, 442 U.S. 200, 210-12 (1979). That it does not do so, nor deem itself required to do so, makes the INS area control operations all the more dangerous to individual liberty.

subject to lawful arrest did not provide probable cause to search respondent).<sup>23</sup>

Notwithstanding the systematic decisions of this Court, the INS argues that "suspicion by statistical inference" should be a proper standard under the Fourth Amendment. The INS poses hypotheticals by which it argues that if officers have probable cause to believe that 99 out of 100, or, even seven out of ten, persons in a factory are illegal aliens, they have sufficient cause to detain all (Pet. Br. at 29, 41). Those hypotheticals do not, of course, reflect the facts of this case. They may present, at best, situations in which the location to be investigated is so

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<sup>23</sup> See also Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), mod., 631 F.2d 91 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1982) (Brennan, J., dissenting), for another disturbing example of the use of mass seizure as a law enforcement tactic.

inextricably bound up with wrongdoing that everyone closely connected with it can individually be suspected of being a party to it. An example of such a situation is contained in United States v. Cortez, 449 U.S. 411 (1981), in which this Court held that, given sufficient facts from which to conclude that a particular automobile is engaged in illegal smuggling, it is not unreasonable to stop that automobile and question its occupants to determine if they are smugglers. Another example is Michigan v. Summers, 452 U.S. 692 (1981), in which this Court held that, given probable cause sufficient to obtain a warrant to search a house for illegal narcotics, it is permissible to detain the occupants of the house during the search. In both those cases, the seizures of the persons were less intrusive than the search of their property, which was justified on

the basis of particularized suspicion. Here, however, we are not dealing with a location so rampant with illegality that all who are present can be suspected of wrongdoing. These raids were not conducted on a thieves' den or an illegal betting parlor; they were conducted on lawful business premises. The persons seized were engaged in lawful endeavors, and in each case a relatively small number of the persons seized were found to be offenders at all.

There is no reason under the language or purpose of the Fourth Amendment to require less than particularized suspicion to justify an investigatory seizure of an entire work force. Mass detentions of innocent persons, whether conducted by INS agents or police officers, are not a permissible law enforcement weapon in a free society. The Fourth Amendment, illuminated by

history and supported by this Court's decisions, demands that conclusion. Accordingly, the Ninth Circuit's decision below is correct and should be affirmed.

## II

### THE FACTORY RAIDS CANNOT BE JUSTIFIED AS AN EXCEPTION TO THE REQUIREMENT OF INDIVIDUALIZED SUSPICION UNDER THE FOURTH AMENDMENT

The government cites but notably does not rely on the fact that this Court has established a very small number of narrow exceptions in which the government may conduct a search or seizure without individualized suspicion of illegal conduct.<sup>24</sup> None of these exceptions, most of which have deep historical roots, bear on this case. The narrow exceptions

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<sup>24</sup> The government itself does not argue that the factory raids fit any of the established exceptions. It merely lists the exceptions as examples of searches and seizures conducted without individualized suspicion (Pet. Br. at 41-42). But it has not even attempted to show that any of these examples justify the factory raids, nor could any such showing be made.

include government conduct which has a very long history of acceptance -- sometimes as long as the Fourth Amendment itself. Moreover, all of the exceptions involve only the most limited kind of government intrusion into the area of protected Fourth Amendment rights, and in most cases do not even involve the seizure of persons. The factory raids at issue here do not fall into any of the exceptions, nor are they even remotely analogous to those exceptions.

A.    The Factory Raids Cannot Be  
Justified as Administrative  
Inspections

This Court has permitted administrative area inspections without particularized suspicion of illegal conduct in two circumstances: routine inspections of residential and commercial property necessary to enforce health and safety codes, Camara v. Municipal Court, 387 U.S. 523, 538 (1967); See v. City of

Seattle, 387 U.S. 541 (1967), and routine inspections of the premises of certain pervasively regulated industries to ensure compliance with those regulations. Donovan v. Dewey, 452 U.S. 594 (1981); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

However, the Fourth Amendment interests involved in the two lines of cases that those decisions represent are fundamentally different from the interests involved in factory raids.

The administrative inspection cases involve only the government's power to enter property and to conduct a limited search of that property. The administrative search is completely impersonal: a government employee inspects the premises to determine whether the premises comply with the applicable code or regula-



tions.<sup>25</sup> The only Fourth Amendment interest addressed in such cases is the expectation of privacy that the owner/occupant enjoys in his property. See, e.g., Donovan v. Dewey, supra, 452 U.S. at 598 (discussing the privacy interest of "the owner of commercial property . . . in such property"); United States v. Biswell, supra, 406 U.S. at 316 (discussing "the dealer's justifiable expectations of privacy"). But the rights of the property owner are not at issue here. As all agree, the property interest of the factory owners in these

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<sup>25</sup> For example, in Camara, which involved safety-code inspections of residential property, the Court emphasized that the searches were limited to "routine periodic inspections of all structures," 387 U.S. at 535-36, and that "the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, [and therefore] they involve a relatively limited invasion of the urban citizen's privacy." 387 U.S. at 537. Similarly, in Marshall v. Barlow's, at issue was the authority of OSHA inspectors "to search a plant" to discover "dangerous conditions outlawed by the Act includ[ing] structural defects . . . [and] a myriad of safety details." 436 U.S. at 316.

cases is wholly different from the personal privacy interest of his employees.

The administrative inspection cases say nothing about the government's power to seize persons found on the premises. None of the administrative inspections that have been reviewed by this Court involved the seizure of persons, nor did they involve the Fourth Amendment rights of any employees on the premises. Such inspections, which are not "personal in nature," Camara, supra, 387 U.S. at 537, do not encompass and cannot justify the seizure and detention of people during a factory raid.

Moreover, none of the special factors which combine to make the limited intrusion of administrative inspections "reasonable" within the meaning of the Fourth Amendment apply to the factory raids. In most cases, the administrative

inspection was upheld at least in part because of a very long tradition of public acceptance.<sup>26</sup> However, no such tradition underlies factory raids by the INS, which were commenced less than ten years ago.<sup>27</sup> Thus, for example, while "a [firearms] dealer chooses to engage in this pervasively regulated business and to accept a federal license, . . . [and] does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection,"

26 Thus, in Camara the Court held that code-enforcement inspections were reasonable within the meaning of the Fourth Amendment in part because "such programs have a long history of judicial and public acceptance." 387 U.S. at 537 (citing Frank v. State of Maryland, 359 U.S. 360, 367-71 (1959)). Similarly, the Court has noted that the administrative inspections of business premises selling liquor (considered in Colonnade) and firearms (considered in Biswell) were justified by the "long tradition of close government supervision." Marshall v. Barlow's, Inc., supra, 436 U.S. at 313.

27 Hearings on Undocumented Aliens Before the Subcommittee on the Department of State, Justice & Commerce, the Judiciary, and Related Agencies, 95th Cong., 2d Sess. 324 (1978).

United States v. Biswell, supra, 406 U.S. at 316, a citizen or resident alien, such as Mr. Delgado, who goes to work in a garment factory has no reasonable expectation that he will be subjected to repeated detention by the government without any suspicion of wrongdoing on his part.

Furthermore, unlike the factory raids at issue herein, the administrative inspections upheld by this Court have allowed the inspectors little discretion. The fear of abuse of discretion by an agent in the field was the focus of the Court's concern expressed in all of the administrative search. Thus, the issue in each case was not whether the administrative inspections could be conducted at all, but whether a warrant was required to delineate and curtail the scope of the agent's powers. See, e.g., Camara v. Municipal Court, supra, 387 U.S. at 533.

For example, the Court in Marshall v. Barlow's, supra, found that the authority to conduct inspections under Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), ("OSHA") was unconstitutionally broad. OSHA flatly authorizes administrative inspections of any factory and empowers inspectors to question any owner or employee. The statute does not provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search and interrogate. Finding that Section 8(a) "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search," 436 U.S. at 323, this Court held that a warrant was constitutionally required to conduct an administrative

inspection under that Section. See  
Donovan v. Dewey, supra, 452 U.S. at 600-  
01 (discussing Marshall v. Barlow's  
supra).

In the instant case, INS agents seized entire work forces during the factory raids without any limits to their discretion from either warrants or authorizing statute. As set forth above, the warrants in factory raids define the agents' mission only in the broadest, most sweeping terms. See note 5 infra. The statute does not specifically authorize factory raids, much less provide guidance to limit the agents' discretion in conducting such raids. The government relies on 8 U.S.C. § 1357(a)(1), which contains only a general grant of power to immigration officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." This statute permits

exactly the sort of "unbridled discretion" of the officer in the field that the Court disapproved in Marshall v. Barlow's. Thus, this case does not fall within the category of the administrative inspection cases because the factory raids do not involve merely the routine inspection of property. However, even if they did, the warrantless factory raids would be unconstitutional because they leave the subjects of the raid subject to "[t]he 'grave danger' of abuse of discretion." Delaware v. Prouse, 440 U.S. 648, 662 (1979) (citation omitted).

Under the teaching of Camara, Marshall v. Barlow's, and the other administrative inspections cases, it is clear that administrative inspectors could, pursuant to warrant, enter the plants in question and inspect them for building code violations and similar regulatory infractions. To suggest that

those cases also validate the wholesale seizure of all the persons employed at those factories is to equate people with property and to ignore the great potential for abuse inherent in the exercise of such unrestrained and arbitrary power.

B.     The Factory Raids Cannot Be  
          Justified as Investigatory  
          Stops Near the Border

The Government also relies on United States v. Martinez-Fuerte, 428 U.S. 543 (1976), which involved investigatory stops of automobiles conducted near the Mexican border, and which represents the only case in which the Court has tolerated even a very brief seizure of persons without individualized suspicion. In Martinez-Fuerte, the Court permitted the Border Patrol to stop all vehicles at permanent checkpoints near the Mexican border to inquire into the citizenship and immigration status of the occupants without any particularized suspicion that



a given vehicle contained an illegal alien. While the Court reaffirmed that "individualized suspicion is usually a prerequisite to a constitutional search or seizure," id. at 560, it upheld the use of fixed-checkpoints because of the extremely minimal intrusion of the checkpoint stop and because of the special problems of policing the Mexican border.

On its face and by its terms, Martinez-Fuerte was limited to activities of the Border Patrol within 100 miles of the Mexican border. 428 U.S. at 545, 549-50, 552 (checkpoints 66 miles and 65-90 miles from the Mexican border maintained at intersection of roads leading from the border). The Martinez-Fuerte exception does not, therefore, apply to factory raids conducted throughout the United States, and provides no justification for the relaxation of the individualized suspicion requirement in the

instant case.

Perhaps more importantly, the checkpoint stops in Martinez-Fuerte were held to be reasonable because of their extremely brief, unintrusive nature. Thus, the Court emphasized that "the potential interference with legitimate traffic is minimal," 428 U.S. at 559, the stops are "routine," and "[t]he objective intrusion of the stop and inquiry . . . remains minimal." Id. at 560. The average length of an investigative stop was only three to five minutes. Id. at 547.<sup>28</sup>

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<sup>28</sup> The Court also identified specific elements peculiar to the fixed checkpoints that minimized the government's intrusion on Fourth Amendment rights. First, because the checkpoints are fixed, motorists "are not taken by surprise" and "they know . . . [they] will not be stopped elsewhere." 428 U.S. at 559. The Court found that "the stops should not be frightening or offensive because of their public and relatively routine nature." Id. at 560. Second, checkpoint operations "involve less discretionary enforcement activity"; the Court found that the "regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding (footnote continued)

Finally, the Court relied on the especially limited "expectation of privacy in an automobile and of freedom in its operation" and the fact that similar "[s]tops for questioning . . . are used widely at state and local levels." Id. at 560 n.14, 561; see also Texas v. Brown, 51 U.S.L.W. 4361, 4367 n.1 (U.S. Apr. 19, 1983) (No. 81-419) (Powell, J., concurring). Each of these factors, peculiar to fixed checkpoints, is critical: The Court emphasized that only because of such factors were the nonparticularized stops permissible. See 428 U.S. at 558-59 (contrasting roving-patrol stops). As the Court stated in summary,

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motorists, that the stops are duly authorized and believed to serve the public interest." Id. at 559. Moreover, the discretion of the officers in the field is constrained because the choice of location of the checkpoint is determined by their superiors. Id. In addition, "since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." Id.

"our holding today is limited to the type of stops described in this opinion.

'[A]ny further detention . . . must be based on consent or probable cause.'"

Id. at 567 (citation omitted).

Factory raids share none of the mitigating factors, cited by the Court in Martinez-Fuerte. Indeed, the detentions of the work forces in the instant case were substantially more intrusive than the stops in Martinez-Fuerte. Rather than lasting three to five minutes, the detention lasted up to two hours during which time work was disrupted and individual workers were subjected to serious intrusion into their security and their privacy. As the Court recently stated in United States v. Place, 51 U.S.L.W. 4844, 4848 (U.S. June 20, 1983) (No. 81-1617), "although we decline to adopt any outside time limitation for a permissible Terry stop, we have never

approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case."<sup>29</sup>

Moreover, in contrast to fixed-checkpoint stops, factory raids catch the employees by surprise and subject them to the unrestricted discretion of INS field agents as they roam throughout the building. In the instant case, the selection

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29 See also Florida v. Royer, 51 U.S.L.W. 4293, 4295 (U.S. Mar. 23, 1983) (No. 80-2146) (plurality opinion) (White, J.) ("an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. . . . It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure."); id. at 4298 (Brennan, J., concurring) ("The scope of a Terry-type 'investigative' stop and any attendant search must be extremely limited or the Terry exception would 'swallow the general rule that Fourth Amendment seizure [and searches] are 'reasonable' only if based on probable cause.' . . . In my view, any suggestion that the Terry reasonable suspicion standard justifies anything but the briefest of detentions or the most limited of searches finds no support in the Terry line of cases.").

of the factory and the supervision of the raid were apparently carried out by the same officials. J.A. 52-53. The record indicates that the shock and coercive nature of the raids were deeply disturbing to the persons involved.

By seeking to extend the Martinez-Fuerte exception into the interior, the government would dramatically expand its power to invade the everyday business and commercial life of American citizens and resident aliens. See U.S. v. Brignoni-Ponce, 422 U.S. at 882-84.<sup>30</sup>

<sup>30</sup> The government argues that Brignoni-Ponce provides support for the factory raids because the Court did not specify that the officers need possess reasonable suspicion with respect to every occupant (Pet. Br. at 42). However, this mischaracterizes the Court's decision. For example, in United States v. Cortez, 449 U.S. 411, 417-18 (1981), the Court cited Brignoni-Ponce for the rule that "detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."

The Court in Brignoni-Ponce, stated that all of the Border Patrol's traffic-checking operations are aimed at vehicles smuggling illegal aliens across the border or from the border (footnote continued)

In Martinez-Fuerte and related cases, this Court found that minimal intrusions upon personal liberty were justified by the virtually "impossible" law enforcement task of patrolling the 2000-mile long Mexican border.<sup>31</sup> In this case, the level of intrusion sought by the government is substantially greater

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area, 422 U.S. at 879; the nature of this illegal alien traffic generates certain specific grounds for identifying violators, id. at 883; and the Court defined the reasonable suspicion required to stop a vehicle as reasonable suspicion of such "smuggling operations." Id.; see id. at 885 ("the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling"). Thus, the Court was clearly focusing on "smuggling operations," and obviously everyone in an automobile engaged in smuggling is implicated in the smuggling by his very presence. By contrast, the vast majority of the persons in the raided factories in the instant case were citizens or legal aliens and their presence in those factories did not implicate them in any unlawful activity.

31 United States v. Brignoni-Ponce, supra, 422 U.S. at 879 ("The Mexican border is almost 2000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings."); see also Michigan v. Summers, 452 U.S. 692, 698-99 (1981).

than in any previous case; yet the government has failed to demonstrate a commensurately compelling need for the exceptional relaxation of constitutional standards which it seeks.

The area control operations conducted by the INS are a minor part of the government's overall immigration enforcement program. Eighty-five percent of the illegal aliens apprehended in 1982, for example, were caught by Border Patrol officers, who conduct traffic control operations such as those discussed in Martinez-Fuerte.<sup>32</sup> The remaining fifteen per cent of the apprehensions resulted from several different types of INS operations, of which factory raids are only one method. The government has failed to demonstrate that the factory raids significantly deter the entry of

<sup>32</sup> United States Department of Justice, Monthly Report of Deportable Aliens Found in U.S. By Nationality, Status at Entry (fiscal year 1982).



aliens into the United States or that they substantially contribute to the permanent expulsion of undocumented aliens who have already gained entry. Indeed, the mounting evidence is to the contrary.

The preliminary findings of a study conducted at the University of California at San Diego, for example, suggest that most workers who were apprehended in an intensive series of INS factory raids in 1982 later returned to their jobs, sometimes only a few days after their seizure. In instances where the raids did produce job vacancies, very few of the jobs were then taken by United States born or legally resident aliens.<sup>33</sup> There is no substantial evidence that factory raids permanently contribute to reducing the number of illegal aliens or that they

<sup>33</sup> Center for U.S.-Mexican Studies, University of California - San Diego, Overview of Activities, 1980-1983, at 58-60 (July 1983).

serve to create substantial numbers of employment positions for citizens and other legal residents.

In summary, neither the degree of intrusiveness nor the extent of the government interest justifies extension of Martinez-Fuerte to factory raids.<sup>34</sup>

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<sup>34</sup> The Government also relies on United States v. Villamonte-Marquez, 51 U.S.L.W. 4812 (U.S. June 17, 1983) (No. 81-1350), in which the Court held that customs officers may board vessels in waters providing ready access to the open sea without any suspicion of a law violation. Factory raids, however, cannot be justified as a boarding of vessels. Villamonte-Marquez rested on (1) the 200-year history and approval of such boardings; (2) the limited nature of the intrusion -- the officers merely inspect the vessel's documentation and visit public areas of the vessel; and (3) the importance of such boardings in the regulation of certain trades, of imports and exports, for the collection of customs duties and to prevent the entry of illegal weapons, diseased animals, and adulterated foods, as well as illegal aliens. None of these elements apply to factory raids, and this exception, like the others, is totally inapposite.

### CONCLUSION

For the foregoing reasons, the court below was correct in holding that the INS area control operations at issue here were unreasonable seizures in violation of the Fourth Amendment. Accordingly, this Court should affirm the decision of the Court of Appeals for the Ninth Circuit.

Dated: New York, New York  
November 12, 1983

Respectfully submitted,

DAVID M. BRODSKY  
AEGIS J. FRUMENTO  
E. SCOTT GILBERT  
RONALD A. SARACHAN  
PETER delVECCHIO  
Schulte Roth & Zabel  
460 Park Avenue  
New York, New York 10022  
212-758-0404

BURT NEUBORNE  
(Counsel of Record)  
CHARLES S. SIMS  
American Civil  
Liberties Union  
Foundation  
132 West 43rd Street  
New York, New York 10036  
212-948-9800

Counsel for Amicus  
Curiae\*

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No. 82-1271

ALEXANDER L. STEVAS.  
CLERK

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**BRIEF OF THE MEXICAN AMERICAN LEGAL  
DEFENSE AND EDUCATION FUND, INC.  
AND THE AMERICAN JEWISH COMMITTEE  
AS AMICUS CURIAE  
IN SUPPORT OF AFFIRMANCE**

**MICHAEL KANTOR**

*Amicus Curiae Counsel of Record,*

**ALAN DIAMOND**

**JOHN W. COCHRANE**

**CARY H. THOMPSON**

**MANATT, PHELPS, ROTHENBERG & TUNNEY,**

**1888 Century Park East**

**21st Floor**

**Los Angeles, California 90067**

**(213) 556-1500**

*Attorneys for Amicus Curiae,*

*Mexican American Legal Defense*

*and Education Fund, Inc. and*

*American Jewish Committee*

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---

MICHAEL KANTOR  
*Amicus Curiae Counsel of Record,*

ALAN DIAMOND  
JOHN W. COCHREANE  
CARY H. THOMPSON  
MANATT, PHELPS, ROTHENBERG & TUNNEY,  
1888 Century Park East  
21st Floor  
Los Angeles, California 90067  
(213) 556-1500  
*Attorneys for Amicus Curiae,  
Mexican American Legal Defense  
and Education Fund, Inc. and  
American Jewish Committee*

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS	1
ISSUE PRESENTED	1
STATEMENT OF THE CASE	2
I. FACTORY RAIDS VIOLATE THE IMMIGRATION AND NATIONALITY ACT, §§ 287(a)(1) AND (2)	6
II. FACTORY RAIDS VIOLATE THE FOURTH AMENDMENT	9
A. The INS Actions Constituted A Seizure Invoking The Protections Of The Fourth Amendment	9
B. The Fourth Amendment Requires A Careful And Critical Balancing Of Government And Individual Interests	11
C. The Fourth Amendment Demands Individu- alized Suspicion Of Illegal Conduct As A Pre- requisite To Seizures Of Individuals	13
1. This Court Requires Individualized Sus- picion Except In A Few Limited Circum- stances Inapplicable Here	13
2. The Lower Courts Have Required Indi- vidualized Suspicion	16
3. The Individual Interests Protected By The Fourth Amendment Greatly Out- weigh The Government's Interest In Engaging In Factory Raids	18
D. The INS Had Inadequate Individualized Suspicion Of Alienage Or Illegal Alienage To Justify The Factory Raids	22

	Page
III. THE INS' FACTORY RAIDS VIOLATE THE EQUAL PROTECTION GUARANTEES OF THE FIFTH AMENDMENT	25
A. A Decision Based On The Equal Protection Guarantees of the Fifth Amendment Is Nec- essary In Order To Protect Respondents As Well As Other Persons Similarly Situated	25
B. The Constitutional Guarantee Of Equal Pro- tection Of The Law	26
CONCLUSION	30



## TABLE OF AUTHORITIES

	Page
CASES	
<i>Almeida-Sanchez v. U.S.</i> , 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973)	14, 20
<i>Ashwander v. Tennessee Valley Authority</i> , 297 U.S. 288, 56 S.Ct. 466 (1936)	7
<i>Au Yi Lau v. INS</i> , 144 App.D.C. 147, 445 F.2d 217 (D.C. Cir.), <i>cert. denied</i> , 404 U.S. 864, 92 S.Ct. 64, 30 L.Ed.2d 108 (1971)	9, 16
<i>Babula v. INS</i> , 665 F.2d 293 (3d Cir. 1981), <i>cert.</i> <i>granted</i> , <i>INS v. Delgado</i> , 103 S.Ct. 1872 (1983)	9, 16, 17
<i>Bolling v. Sharpe</i> , 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)	26
<i>Brown v. Texas</i> , 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979)	7, 12, 15, 20, 23
<i>Camara v. Municipal Court</i> , 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967)	16, 25
<i>Carroll v. U.S.</i> , 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925)	14
<i>Colonnade Catering Corp. v. U.S.</i> , 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970)	15
<i>Delaware v. Prouse</i> , 440 U.S. 648, 99 S.Ct. 1397, 59 L.Ed.2d 660 (1979)	11, 12, 13, 15
<i>Donovan v. Dewey</i> , 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981)	16
<i>Florida v. Royer</i> , 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)	9, 11, 12, 23
<i>Gillard v. Schmidt</i> , 579 F.2d 825 (3d Cir. 1978)	18
<i>ILGWU v. Sureck</i> , 681 F.2d 624 (9th Cir. 1982), <i>cert.</i> <i>granted</i> , <i>INS v. Delgado</i> , 103 S.Ct. 1872, 76 L.Ed.2d 805 (1983)	9, 16, 17
<i>Illinois v. Lafayette</i> , 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983)	12

## CASES (continued)

	Page
<i>Illinois Migrant Council v. Pilliod</i> , 531 F.Supp. 1011 (N.D. Ill. 1982)	9, 16, 17
<i>Jenkins v. United States</i> , 161 F.2d 99, 101 (10th Cir. 1947)	6
<i>Kolender v. Lawson</i> , 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)	14
<i>Korematsu v. U.S.</i> , 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944)	26, 27
<i>Lee v. INS</i> , 590 F.2d 497 (3d Cir. 1979)	6
<i>Lorillard v. Pons</i> , 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed. 2d 40 (1978)	7
<i>Marquez v. Kiley</i> , 436 F.Supp. 100 (S.D.N.Y. 1977)	11, 16, 17, 29
<i>Marshall v. Barlow's Inc.</i> , 435 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978)	15, 16
<i>Medina-Sandoval v. INS</i> , 524 F.2d 658 (9th Cir. 1975)	17
<i>Mendoza v. INS</i> , 559 F.Supp. 842 (W.D. Tex. 1982)	11
<i>Merrill Lynch, Pierce, Fenner &amp; Smith v. Curran</i> , 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982)	7
<i>Ojeda-Vinales v. INS</i> , 523 F.2d 286 (2d Cir. 1975)	16
<i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972)	13
<i>Pennsylvania v. Mimms</i> , 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)	12
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979)	8
<i>See v. City of Seattle</i> , 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967)	18

## CASES (continued)

	Page
<i>Sibron v. New York</i> , 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968)	17
<i>Smith v. Goguen</i> , 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed. 2d 605 (1974)	14
<i>Tejeda-Mata v. INS</i> , 626 F.2d 721, <i>reh. denied</i> , 665 F.2d 268 (1981), <i>cert. denied</i> , 456 U.S. 994, 102 S.Ct. 2280, 73 L.Ed.2d 1291 (1982) (9th Cir. 1980)	7
<i>Tennessee Valley Authority v. Hill</i> , 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978)	7
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	9, 12, 13
<i>Two Guys From Harrison-Allentown, Inc. v. McGinley</i> , 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961)	29
<i>U.S. v. Biswell</i> , 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972)	15
<i>U.S. v. Brignoni-Ponce</i> , 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)	6, 8, 11, 12, 21, 23
<i>U.S. v. Cortez</i> , 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)	12, 13, 22
<i>U.S. v. Mallides</i> , 473 F.2d 859 (9th Cir. 1973)	24
<i>U.S. v. Martinez-Fuerte</i> , 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed. 1116 (1976)	14, 18, 19, 24
<i>U.S. v. Mendenhall</i> , 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)	9
<i>U.S. v. Place</i> , 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)	12
<i>U.S. v. Robinson</i> , 311 F.Supp. 1063 (W.D. Mo. 1969)	29
<i>U.S. v. Scott</i> , 149 F.Supp. 837, 840 (D.D.C. 1957)	6
<i>U.S. v. Steele</i> , 461 F.2d 1148 (9th Cir. 1972)	29

## CASES (continued)

	Page
<i>U.S. v. Villamonte-Marquez</i> , 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983)	11, 15, 18
<i>Weinberger v. Wiesenfeld</i> , 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975)	26
<i>Ybarra v. Illinois</i> , 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed. 2d 238 (1979)	17
<i>Fick Wo v. Hopkins</i> , 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed.220 (1886)	27, 28, 29

## CONSTITUTION

U.S. Const., Amend. IV	1, 7, 8, 11, 12, 13, 18, 20, 25, 26
U.S. Const., Amend. V	1, 13, 20, 25, 26
U.S. Const., Amend. XIV	26

## STATUTES

Immigration and Nationality Act, § 287(a)(1), 8 U.S.C. § 1357(a)(1) (1976)	1, 6, 7
Immigration and Nationality Act, § 287(a)(2), 8 U.S.C. § 1357(a)(2) (1967)	1, 6, 7

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## MISCELLANEOUS (continued)

	Page
INS, <i>Preliminary Report on Project Jobs 1</i> (1983)	21
Los Angeles Times, January 17, 1981, Part 1, at 21	2
<i>U.S. Immigration Policy and the National Interest: Committees on the Judiciary, House of Representatives and the United States Senate, 97th Cong., 1st Sess. 8</i> (1981)	21
<i>U.S. Immigration Policy and the National Interest: Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy to the Congress and the President of the United States, 97th Cong., 1st Sess. 47</i> (1981)	21

## TEXTBOOKS

North, <i>Enforcing the Immigration Law: A Review of the Options</i> (1980)	21
L. Tribe, <i>A Structure for Liberty</i> (1978)	27

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,  
*Petitioners,*

vs.

HERMAN DELGADO, ET AL.,  
*Respondents.*

On Writ of Certiorari To The United States  
Court of Appeals for the Ninth Circuit

**BRIEF OF THE MEXICAN AMERICAN LEGAL  
DEFENSE AND EDUCATION FUND, INC.  
AND THE AMERICAN JEWISH COMMITTEE  
AS AMICUS CURIAE**

**INTEREST OF AMICUS**

This amicus brief is filed on behalf of the American Jewish Committee ("AJC") and the Mexican American Legal Defense and Education Fund, Inc. ("MALDEF"), two organizations deeply concerned with the protection of civil rights and the guaranteeing of equality for all.

MALDEF and the AJC believe that the Immigration and Naturalization Service's factory raids and their use of racial characteristics as a primary factor in determining those persons to be detained and questioned violate the Constitutional rights of persons of Latin ancestry and pose a potential threat to members of all minority groups.

**ISSUE PRESENTED**

Do the factory raids conducted by the Immigration and Naturalization Service violate the Fourth and Fifth Amendments of the Constitution and Section 287 of the Immigration and Nationality Act, 8 U.S.C. § 1357?

## STATEMENT OF THE CASE

This lawsuit involves a search and seizure practice engaged in by the Immigration and Naturalization Service ("INS") — the self-styled "factory survey" — which by its nature depends on, and in application results in, the use by the Federal Government of an invidious racial and ethnic classification. Interestingly, the Justice Department itself has abandoned the term factory survey in favor of the term factory raid,<sup>1</sup> a name which better approximates the real nature of this practice: the mass detention and interrogation of numerous individuals of Hispanic ancestry at places of employment hundreds of miles from the Mexican border on no more than the chance that persons of brown skin who speak with an accent might conceivably be deportable aliens.

The individual plaintiffs in this case are natural-born citizens of the United States (Herman Delgado and Ramona Correa) and lawful resident aliens (Frances Labonte and Maria Miramontes), each for more than 20 years. (J. A. at 79, 100; Deposition of Frances Labonte at 6; Deposition of Maria Miramontes at 18). Plaintiffs Delgado, Correa and Labonte at the time of the factory raids were employed at the Southern California Davis Pleating Company ("Davis") and plaintiff Miramontes was employed at Mr. Pleat. (Delgado Deposition at 8; Correa Deposition at 5; Labonte Deposition at 5; Miramontes Deposition at 5).

On the mornings of January 4, 1977, and again on September 27, 1977, agents of the INS raided the Davis garment factory searching for undocumented aliens. The Mr. Pleat factory was raided by the INS on October 3, 1977.

While the determination to raid a particular factory is often based on a complaint (J.A. at 47), the record below is bereft of any evidence which would suggest that the complaints relied on by the INS in this case were reliable, or were themselves using other than racial factors in reaching the conclusion that aliens illegally in the United States were working at a particular factory. The record

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<sup>1</sup> Los Angeles Times, January 17, 1981, Part 1, at 21.

below, comprising numerous depositions of INS agents and management personnel, responses to interrogatories and sworn affidavits, demonstrates that no INS agent had consulted specific objective criteria in determining whether any of the roving patrol raids on the factories involved herein were in order. On the contrary, the factors looked to were largely limited to the racial or ethnic characteristics of the work force: for example, the Hispanic appearance of the employees and whether or not Spanish was spoken. (*See, e.g.*, Tellez Deposition at 8-9). Mr. Kee, for example, relied on the fact that he had observed 20 persons of "apparent Latin descent" inside the Davis factory as a basis for showing probable cause that illegal aliens were employed there.<sup>2</sup>

The INS conceded that all factory raids in which its agents are involved are carried out in the same manner as the three raids which are the subject of this lawsuit. (J.A. at 48). On the date of a raid, a large number of INS agents appear suddenly at a factory carrying guns and wearing badges. (Deposition of Gilbert Clarin at 109; Smith Deposition at 111). All exits are sealed so that "individuals will not escape." (J.A. at 48). The workers are aware that the exits are sealed and guarded. (J.A. at 143-44). Some individuals attempt to flee or hide. (J.A. at 53). Most workers, however, remain at their work stations doing nothing unusual. (Clarin Deposition at 101-102). Those who attempt to escape are quickly apprehended by INS agents, arrested and handcuffed in plain view of the remainder of the employees. (Walters Deposition at 44; Clarin Deposition at 108, 109; J.A. at 103). After the initial confusion and a

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<sup>2</sup> Probable cause for a search warrant was also based on statements obtained from three Latin American women arrested on their way to work at the Davis plant. The statements implied that other employees of the Davis plant were undocumented workers. None of the three women, however, gave the INS a single name, nor did they identify any person alleged to be an illegal alien. There was nothing to indicate that the three aliens arrested were not themselves using racial characteristics as the sole basis for concluding that aliens illegally in the United States were working at the particular factory.



flurry of arrests of those attempting to flee, the agents disperse throughout the factory, walking up and down the aisles indiscriminately singling out individuals to be questioned. (J.A. at 84-88; Clarin Deposition at 104; Kee Deposition at 66). The questioning includes inquiries as to the individual's birth place, education, current and previous places at residence and citizenship. (Kee Deposition at 66, 68-69; Dodds Deposition at 78-81). Mr. Labonte and Ms. Miramontes were told to produce their papers proving legal residency. (Clarin Deposition at 111-112; Dodds Deposition at 78-80; Delgado Deposition at 78-81).

For one or two hours the questioning of individual workers by the INS agents continues. (J.A. at 48). Understandably, the workers are nervous and extremely frightened during this time. (J.A. at 103, 107, 121, 129). There is a clear perception by the members of the work force that individuals with Latin features are singled out for attention by INS agents. (J.A. at 85-87). Work at the factory comes to a virtual standstill while the INS agents remain in the factory. (J.A. at 86, 89, 122). After the INS agents leave, the factor employees remain upset and nervous for days. (J.A. at 16, 130).

To the extent that INS agents apply standards in determining whom to question, they are clearly racial in nature. Phillip Smith, Assistant Director of Investigations for the INS, candidly admitted that Latin appearance was a major factor considered by INS agents. (Smith Deposition at 166-169). Mr. Smith characterized the Latin appearance as consisting of "dark hair," "brown eyes," and "darker skin than other people." (Smith Deposition at 168-169). When asked whether he could point to other factors that would distinguish illegal aliens from legal residents or U.S. citizens, Mr. Smith was unable to do so, testifying that he took into account only whether an individual spoke Spanish or was dressed in "Mexican garb" or was nervous, factors which could obviously apply to legal aliens or U.S. citizens

as well. (Smith Deposition at 151). Other INS agents openly admitted that they based their individual interrogation decisions on whether or not a person had Latin features, the clothing that an individual was wearing and whether an individual could speak English. (Clarín Deposition at 78a, 106; Tellez Deposition at 8; Walters Deposition at 37, 43).

Absent the factors mentioned above, the depositions of INS agents involved in the raids in question are bereft of criteria, specific and articulable or otherwise, that would provide an objective standard on which to base a determination as to which individuals should be detained and questioned from among the detained employees. Indeed, Assistant Director Phillip Smith conceded that field agents were given no guidance on how to determine who should be questioned during a factory raid. (Smith Deposition at 151). Further, the INS itself admitted in its Answers to Interrogatories that, in a factory raid, agents often have no specific, articulable reason for questioning specific individuals. (Answer to Plaintiff's Fourth Set of Interrogatories, No. 6) — much less for detaining each and every member of the work force.

On the basis of the foregoing testimony alone, the Court can see the pervasive manner in which impermissible racial characteristics are used in INS factory raids. In addition, the record contains expert testimony that establishes that the very characteristics on which the INS relies are totally insufficient to provide a basis for distinguishing undocumented aliens from legal residents or U.S. citizens.<sup>3</sup>

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<sup>3</sup> For example, Professor Wayne A. Cornelius of the University of California, San Diego, and Professor Sheldon Maram of California State University, Fullerton, both experts in the area of Latin American immigration, testified that they were unaware of any difference between legal immigrants or naturalized citizens of Latin ancestry, on the one hand, and undocumented aliens, on the other, with respect to skin color, eye color, hair color, height or other physical characteristics. (J.A. at 58, 65-67). The utility of relying on manner of dress or type of clothing in attempting to uncover aliens illegally in the United States is also questionable. (J.A. at 58-59, 67-69)

## I.

# FACTORY RAIDS VIOLATE THE IMMIGRATION AND NATIONALITY ACT, §§ 287(a) (1) and (2).

Petitioners contend that Section 287(a) (1) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a) (1) (1976) authorized the factory raids conducted in this case. That section provides that INS agents may, without a warrant, "interrogate any alien or person believed to be an alien as to his right to be and remain in the United States." Assuming *arguendo* that § (a) (1) is applicable to the actions of the INS in detaining an entire work force for selective questioning, that section does not authorize the blanket, racially-motivated detentions involved herein.

When Congress enacted § 287 in 1952, it made "a carefully considered distinction between powers which may be exercised without warrant and where such a warrant will be required." H.Rep. No. 1365, 82d Code Cong., 2d Sess. 55, reprinted in [1952] U.S. Code Cong. and Ad. News 1653, 1710. Thus, § 287(a) (1) authorizes questioning of suspected "aliens," while § 287(a) (2) authorizes custodial detention or arrest of suspected "illegal aliens" even in the absence of an arrest warrant.<sup>4</sup>

<sup>4</sup> Respondents do not concede that "detentive" interrogations are contemplated or authorized by § 287(a) (1). Rather, it is *only* § 287(a) (2) which authorizes the "arrest" of an *individual* which the INS may have an articulable basis to believe is an *illegal* alien. This distinction between §§ (a) (1) and (a) (2) is both crucial and consistently overlooked by the courts. For example, in *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 880-884, (1975), this Court construed § (a) (1) to authorize "Terry-stops" under certain circumstances, without mention of § (a) (2). See also, e.g., *Lee v. INS*, 590 F.2d 497, 500-01 (3d Cir. 1979).

The difficulty with this construction of § (a) (1) — or failure to address § (a) (2) — lies in the failure to acknowledge the legislative background of the statute. At the time of the enactment of § 287 in 1952, the term "arrest" was legally understood to encompass "an actual or constructive seizure of the person, performed [and understood] with the intention to effect an arrest," *Jenkins v. United States*, 161 F.2d 99, 101 (10th Cir. 1947) (emphasis added); accord, e.g., *United States v. Scott*, 149 F. Supp. 837, 840 (D.D.C. 1957); See Black's Law Dictionary 140 (4th Ed. 1951). Such a definition encompasses the subsequently developed "detentive questioning" articulated by this Court in *Terry v. Ohio*. Thus, as the statute

(Footnote continued on next page)

Section 287(a)(1) itself does not support the INS. By its terms, § (a)(1) permits the questioning of "any person believed to be an alien." This language necessarily requires *belief* that the *individual* being questioned is an alien. The requirement of individualized belief is necessary to assure consistency with the requirements of the Fourth Amendment, as discussed below, and serves to protect citizens from the threat of unwarranted invasions of their privacy by government authority. Individualized belief of alienage provides at least some of the protection from arbitrary government activity that would ordinarily be provided by a warrant.

As this Court emphasized in *Brown vs. Texas*, 443 U.S. 47, 52 (1979), "When . . . a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."<sup>5</sup> Unless § 287(a)(1) requires objective and individualized criteria, its requirements of belief would be largely eviscerated since an officer's testimony that he subjectively believed the questioned person to be an alien would be almost impossible to evaluate. Because courts

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(Footnote continued)

should of course be viewed in light of its history and as Congress is deemed to legislate with an understanding of existing law, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, (1983); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), it is submitted that *detentive* questioning by the INS can only be authorized statutorily by § 287(a)(2). That provision on its face requires specific and individualized suspicion of illegal alienage in order to justify the significant intrusion upon personal rights entailed by such involuntary detention and interrogation by the INS. It is further submitted that such a construction of §§ (a)(1) and (a)(2) would eliminate the rampant abuse of personal liberties evidenced by the INS's mass detentions at issue in this case. The statute should be construed as written by Congress, *e.g.*, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). The present construction of § (a)(1) and avoidance of § (a)(2) only serves to invite the uncomfortable constitutional confrontations which are presented by this matter. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

<sup>5</sup> A requirement of objective criteria is consistent with the interpretations of § 287(a)(1) by the few lower courts which have considered the requirements of that section independent of the Fourth Amendment. In *Tejeda-Mata v. INS*, 626 F.2d 721, 724 (9th Cir. 1980), *cert. denied*, 456 U.S. 994 (1982), for example, the court required (and found) adequate circumstances to support the "reasonableness" of the INS agent's belief of alienage.

must give effect to every provision of a statute if possible, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), the statute should be interpreted as requiring objective criteria.

In the case of factory raids the INS can show *neither* objective *nor* subjective belief. In its sworn answers to interrogatories the INS admitted that, in a factory raid, agents often have no specific, articulable reason for questioning and detaining individuals. Answer to Plaintiff's Fourth Set of Interrogatories, No. 6. If the justifications are viewed objectively, it is clear the agents had insufficient grounds to believe those questioned were aliens. At most, all they knew is that informers had told them the factories employed illegal aliens and that some of the employees appeared to be of Hispanic ancestry. Perhaps they noticed that some spoke with an "accent," although one may ask how they would know this in most cases until after they had commenced interrogation. This is simply not enough to justify a belief of alienage. In Southern California, and indeed in most of the Southwest, large proportions of the citizenry are or appear to be of Hispanic ancestry, and many citizens speak Spanish as their preferred tongue. *See, e.g., U.S. v. Brignoni-Ponce*, *supra* 442 U.S. at 887 & n.12 (1975).

If the INS is permitted to detain and question people — including American citizens — merely because of their appearance, Americans like respondents Delgado and Correa will inevitably be interrogated in total disregard of their rights as citizens. The court of appeals was therefore correct in reversing the district court's summary judgment for the INS. Even if § 287(a)(i) is held to apply herein, *but see* note 4, *supra*, the INS's factory raid procedures are inherently contrary to that provision's demand for reasonable, individualized belief of alienage.

## II.

## FACTORY RAIDS VIOLATE THE FOURTH AMENDMENT

### A. The INS Actions Constituted A Seizure Invoking The Protections Of The Fourth Amendment.

The government argues that INS agents' conduct did not constitute a seizure and thus need not be measured against the fundamental standard of the Fourth Amendment that government conduct be reasonable. This contention borders on the frivolous, and serves only to distract the Court from the real issues of this case. *Every* lower court which has considered factory raids or on-the-job questioning — even the one which approved the conduct as “reasonable” — has found a seizure and has gone on to apply the strictures of the Constitution. *ILGWU v. Sureck*, 681 F.2d 624, 634 (9th Cir. 1982), *cert. granted*, *INS v. Delgado*, 103 S.Ct. 1872 (1983); *Babula v. INS*, 665 F.2d 293, 295 (3d Cir. 1981), *cert. granted*, *INS v. Delgado*, 103 S.Ct. 1872 (1983); *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971); *Illinois Migrant Council v. Pilliod*, 531 F.Supp. 1011, 1018 (N.D. Ill. 1982).

The basic test for whether a seizure has occurred was laid down by this Court in *Terry v. Ohio*, 392 U.S. 1, 16 (1968):

“It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”

In *U.S. v. Mendenhall*, 446 U.S. 544, (1980), Justice Stewart proposed an amplification of this test: “whether a reasonable person would have believed that he was not free to leave.” *Id.* at 544 (Opinion of Stewart, J.). In *Florida v. Royer*, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), five members of this Court accepted this test. *Id.* at 1327 (Opinion of White, J.); *id.* at 1332 (Opinion of Blackmun, J.).

Applying the *Mendenhall* test, the Court of Appeals concluded that the entire work force was seized when the INS sealed the exits of the factories and began questioning. The facts strongly support this finding: the factory workers neither could have reasonably believed they were, nor were

they in fact, free to leave or to ignore the questions of the INS. There is no question that INS agents sealed the exits to prevent individuals from "escaping,"<sup>6</sup> or that the workers were unaware of this.

The government also claims that no seizure occurred because the workers were not truly "free to leave" in any event, since they were supposed to be at their work positions anyway. This argument seriously distorts the purpose of the "free to leave" criterion. The point is to distinguish between voluntary and coerced reaction to police conduct. That the workers needed to stay at their work posts *increases*, rather than reduces, the extent of the coercive force applied by the INS. By entering and interrogating during work hours, the INS appeared to be acting under color not only of the government's authority but the employer's as well. The INS chose the time and place of the interrogation: it thereby evidently meant to use not only the workers' natural fear of government agents, but also, the fear of losing wages or employment to coerce cooperation.

The government also argues that employees who were not illegal aliens would not have felt their freedom restrained, since they supposedly had nothing to fear from the agents. (Petitioner's Brief at 23). This is both patently absurd as an empirical proposition and irrelevant to the inquiry. Especially given the criteria being used by the agents (ethnic appearance), an American citizen of Mexican ancestry might well fear that he would be harassed by the agents and his truthful assertion of citizenship disbelieved. Even assuming that the simple statement, "I am a citizen" would be enough to satisfy the agents, this still means that to get past the guards at the doors the citizen is *forced to respond* to any questions asked. A failure or refusal to respond might well result in detention or further

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<sup>6</sup> As the court observed in *Illinois Migrant Council v. Pilliod*, *supra*, 531 F.Supp. at 1019, "when agents are stationed at points of egress, it is only reasonable to infer that they are there in order to restrict egress." The *Pilliod* court then rejected as "inherently incredible" claims that the INS' agents would not have detained anyone who attempted to leave. In this case the INS makes no such claim.



harassment.<sup>7</sup> For police action not to constitute a seizure it is essential that the individual be free to "decline to listed to the questions at all and . . . go on his way," and the refusal to respond may not of itself justify detention. *Florida v. Royer, supra*, 103 S.Ct. at 1324 (Opinion of White, J.). If the government argument were accepted, it would justify all seizures under *any* circumstances, since by the government's reasoning no innocent person ever has anything to fear. But the Fourth Amendment protects the innocent individual's right to be left alone.

Even if the entire workforce was not seized for the duration of the raid, each questioned worker was seized during the time he or she was interrogated. The same coercive factors discussed above, combined with the direct assertion of authority in a one-on-one context, make it highly implausible that a person could have reasonably believed he could refuse to reply, or could walk away without triggering possible retribution. *See, e.g., Marquez v. Kiley*, 436 F.Supp. 100, 113-114 (S.D.N.Y. 1977), where the judge acknowledged that consensual questioning is always permissible but observed that as between an armed immigration official and a suspected alien "voluntary" questioning is virtually impossible.

#### **B. The Fourth Amendment Requires A Careful And Critical Balancing Of Government And Individual Interests.**

The question presented by this case is not, as shown in the preceding section, *whether* the Fourth Amendment applies, but *how* it applies. This Court has repeatedly held that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *U.S. v. Villamonte-Marquez*, 103 S.Ct. 2573, 2579 (1983); *quoting Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *U.S. v. Brignoni-Ponce, supra*, 422 U.S. at 878. The individual interests involved

<sup>7</sup> *See, e.g., Mendoza v. INS*, 559 F.Supp. 842 (W.D. Tex. 1982), recounting how one non-English-speaking citizen was arrested and detained for four hours although he produced documents establishing citizenship, because the agents disbelieved their authenticity.



are among the most basic in our society: the right to be left alone, and "to personal security free from arbitrary interference by law officers." *Brown v. Texas*, *supra*, 443 U.S. at 50, quoting *Pennsylvania v. Mimms*, 424 U.S. 106, 108 (1977). It is therefore appropriate for this Court to scrutinize the asserted governmental interests with considerable care, maintaining a particular sensitivity to the protection of individual autonomy and the danger of governmental use of impermissible criteria for determining who shall be made subject to detentive authority. Thus, "the scope of the detention must be carefully tailored to its underlying justification," *Florida v. Royer*, *supra*, 103 S.Ct. at 1325 (Opinion of White, J.); see also *Terry v. Ohio*, *supra*, 392 U.S. at 19; and this Court demands specific information to justify such detention, *U.S. v. Cortez*, 449 U.S. 411, 418 (1981). Moreover, while the existence of less intrusive alternatives to the challenged police conduct does not automatically make that conduct unconstitutional, *Illinois v. Lafayette*, 103 S.Ct. 2605, 2610 (1983), the existence of such alternatives certainly diminishes the government's interest in using the more intrusive procedures. See, e.g., *U.S. v. Place*, 103 S.Ct. 2637, 2645-46; *Delaware v. Prouse*, *supra*, 440 U.S. at 659.

In assessing the government's interest, it is also appropriate for this Court to assess the effectiveness or ineffectiveness of the conduct in accomplishing the stated goals. See, e.g., *id* at 659-661, *U.S. v. Brignoni-Ponce*, *supra*, 422 U.S. at 914-15 (White, J., concurring). Finally, it is essential to remember that the rights of *citizens*, such as respondents Delgado and Correa, are implicated: even if Congress may condition the entry of aliens into this country on their agreement to "submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens." *Id.* at 884 (majority opinion).

**C. The Fourth Amendment Demands Individualized Suspicion Of Illegal Conduct As A Prerequisite To Seizures Of Individuals.**

**1. This Court Requires Individualized Suspicion Except In a Few Limited Circumstances Inapplicable Here.**

A seizure amounting to less than a full arrest may, under certain limited circumstances, be "reasonable" under the Fourth Amendment though justified by less than probable cause. *Terry v. Ohio, supra*. In such cases, however, the critical balance of individual and government interests demands that a detention be justified, at a minimum, by "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *U.S. v. Cortez, supra*, 449 U.S. at 417-18. *Cortez* held that the determination of whether an adequate basis for suspicion existed must be based on "the totality of circumstances," *id.* at 417, and thus approved the inclusion of a government official's expertise and logical deductions in the determination. But *Cortez* in no way weakened the demand that the suspicion justifying any seizure must be *individualized*: it must be "a suspicion that the *particular* individual being stopped is engaged in wrongdoing.... This demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence.*" *Id.* at 418, quoting *Terry v. Ohio, supra*, 392 US at 21, n.18.

The purpose of the individualization requirement is basic to our system of governance: to prevent *arbitrary* violations of individual privacy by government officials who may choose to invade that privacy for impermissible reasons (*e.g.*, to harass a person because of his appearance of race, *cf. Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)) or for no reason at all. *See, e.g., Delaware v. Prouse, supra*, 440 U.S. at 650. This concern animates not only the Fourth Amendment but other clauses of the Constitution, such as the Fifth Amendment, as well. *See, e.g.,*

*Kolender v. Lawson*, 103 S.Ct 1855, 1858 (1983), noting that "the more important aspect of vagueness doctrine 'is . . . the requirement that the legislature establish minimal guidelines to govern law enforcement,' to prevent statutes from authorizing 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" (quoting *Smith v. Goguen*, 415 U.S. 566, 574-575 (1974)).

This Court has authorized exceptions to the demand for individualized suspicion only in extremely limited circumstances, where other factors served to circumscribe the officer's discretion and the intrusion on privacy was extremely minimal, or where the individual's reasonable expectation of privacy was limited by long-standing custom. For example, no individualized suspicion is required to justify a stop and search at the border. *Carroll v. U.S.*, 267 U.S. 132, 153-54 (1925). This was explained in terms of "national self-protection," *id.* at 154, but additionally the expectation of privacy is very low because one crossing the border knows that detention or search is and has always been a possibility in that context. Moreover, border searches are made at fixed points of entry or their functional equivalents, *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 272-73 (1973), and thus present less of an element of surprise to the individual while restricting the discretion of officials. Similarly, in *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976), this Court approved routine, brief questioning without individualized suspicion at permanent checkpoints near the border. The individual's expectation of privacy in such a case is limited, not only because the expectation of privacy in a car is lower in general, *id.* at 156, but also because the traveler is "not taken by surprise as they know, or may obtain knowledge of the checkpoints," *id.* at 559. Moreover, the discretion of the questioning officials is circumscribed: the checkpoint is at a pre-determined, fixed location, *id.* at 559; every car is detained, *id.* at 545-46; the choice of whom to select for longer detention at secondary

inspection areas is made by a different agent from the one who conducts the questioning, *id.* at 546; and the stops are limited to brief questioning, *id.* at 546-47. Just as important, this limitation on discretion is apparent to the motorists. *Id.* at 559. The actual and apparent limits on discretion are extremely important. Thus, in *Brown v. Texas*, *supra*, 443 U.S. 47 (1979) and *Delaware v. Prouse*, *supra*, 440 U.S. 641 (1979) this Court disapproved questioning without individualized suspicion while recognizing that non-arbitrary means of selection (roadblocks, for example), may be acceptable in limited circumstances, where the limits on discretion are apparent to the individuals being questioned. *Brown*, *supra*, 443 U.S. at 51; *Prouse*, *supra*, 440 U.S. at 657.

In *U.S. v. Villamonte-Marquez*, *supra*, 103 S.Ct. 2573, this Court approved another closely-limited exception to the requirement of individualized suspicion. The Court held constitutional a statute authorizing customs officials to board any vessel in American waters, but only for purposes of examining its documentation. The Court found that the intrusion on privacy was limited, in part because it involved "only a brief detention," *id.* at 2581, but more importantly because the expectation of privacy a boat owner or passenger could reasonably have — with respect to document checks — is circumscribed by the long-standing laws, beginning with an act of the First Congress, authorizing such boardings, *id.* at 2577-78 & n. 4.

*Villamonte-Marquez* thus falls into a line of cases holding that in particular circumstances there is "such a history of government oversight that no reasonable expectation of privacy . . . could exist." *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). Boats are thus treated much like gun stores, *see U.S. v. Biswell*, 406 U.S. 311 (1972) (upholding warrantless inspection of gun storeroom pursuant to the Control Act), liquor dealerships, *see Colonnade Catering Corp. v. U.S.* 397 U.S. 72 (1970) (holding that Congress had power to authorize search, though it had not done so), or

mines, see *Donovan v. Dewey*, 452 U.S. 594 (1981) (upholding warrantless mine safety inspections).

The conceptual basis for the above decisions is essentially that "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Marshall v. Barlow's, Inc.*, *supra*, 436 U.S. at 313. Moreover, all these cases, like *Camara v. Municipal Court*, 387 U.S. 523 (1967), authorize intrusions which are not "personal in nature," *id.* at 537. In all these cases the government intrusion — whether questioning or a search — is oriented towards investigation of the *property* — the conformance of the boat, the business premises, or the building to the applicable regulations. By contrast the workers in a factory do not "consent" to being interrogated, and the questions relate to their residency status, which is about as "personal" as questioning can get.

## 2. The Lower Courts Have Required Individualized Suspicion.

In determining the bounds placed on INS factory raids, area control operations, and on-the-job questioning by the Fourth Amendment, the lower courts with only one exception have found that detentive questioning must be supported by individualized suspicion. *ILGWU v. Sureck*, *supra*, 681 F.2d at 634; *Illinois Migrant Council v. Pilliod*, *supra*, 548 F.2d at 715; *Ojeda-Vinales v. INS*, 523 F.2d 286, 288 (2d Cir. 1975); *Au Yi Lau v. INS*, *supra*, 445 F.2d at 223; *Marquez v. Kiley*, *supra*, 436 F.Supp. at 114.

The exception is *Babula v. INS*, *supra*, 665 F.2d 293, wherein two members of the panel held that detentive questioning of individuals was permissible based *only* on knowledge that "the milieu in which the workers were found" included illegal aliens, *id.* at 296. The Court of Appeals in the instant case properly rejected *Babula*, noting that it conflicts with the prior case law in the Third Circuit and apparently misread precedents from other circuits. Furthermore, as Judge Adams' concurrence in *Babula* demonstrates, the

majority decision is dictum.<sup>8</sup> The "milieu" theory in *Babula* is wholly at odds with the fundamental American principle that we judge people for what they *are* rather than whom they associate with. Cf. *Sibron v. New York*, 392 U.S. 40, 62 (1968) ("inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics" inadequate to justify detentive questioning); *Ybarra v. Illinois*, 444 U.S. 85 (1979) (presence in public tavern at same time as suspected narcotics dealer insufficient to justify frisk). The "milieu" theory would, for example, justify seizing everyone in a given neighborhood because of suspicion that someone is breaking the law there. It is not stretching matters too far to say that the *Babula* court's reasoning would put an end to the protections of the Fourth Amendment as we know it.<sup>9</sup>

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<sup>8</sup> Unlike this case or *Pilliod* and *Marquez*, *Babula* was an effort by illegal aliens to prevent their own deportation rather than a suit by legal residents and citizens to prevent violation of their constitutional rights. It is clear that an illegal arrest will "not invalidate a subsequent prosecution and conviction," nor "bar commencement of a civil deportation proceeding." *Medina-Sandoval v. INS*, 524 F.2d 658, 659 (9th Cir. 1975). As Judge Adams notes, even if the exclusionary rule does apply to deportation proceedings — an issue in no way presented by this case — there was easily enough evidence untainted by the illegal arrests in *Babula* to support the finding that the aliens were in this country illegally. *Babula*, *supra*, 665 F.2d at 301-302 (Adams, J., concurring). Thus, the *Babula* court had no need to reach the issue of the constitutionality of the factory raid.

<sup>9</sup> The *Babula* court additionally noted that all the employees at the factory were questioned, and thus analogized the raid to a permissible "roadblock." This reasoning has several flaws, especially as applied to the facts of this case, where not all workers were questioned, see *Sureck*, *supra*, 681 F.2d at 643, probably because this search was directed at a racially identifiable minority (Mexicans) rather than at a subgroup of caucasians (the aliens in *Babula* were all Polish). Even if the INS had, in the instant case, interrogated everyone at Davis or Mr. Pleat, it is obvious that only those with Latin appearance or accent had anything to fear — and those individuals would know it. The appearance of uniform enforcement, which makes roadblocks less threatening, would thus be wholly absent. Moreover, the INS would have no *statutory* authority to interrogate those not believed to be aliens. 8 U.S.C. § 1357(a)(1). While it may be conceivable that the INS truly suspected everyone — at least the white employees — at the factory in *Babula* of being Polish; this theory is plainly untenable in this case, where ethnic

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### 3. The Individual Interests Protected By The Fourth Amendment Greatly Outweigh The Government's Interest In Engaging In Factory Raids.

A careful consideration of the individual and governmental interests at stake in a factory raid demonstrates that factory raids are unreasonable under the Fourth Amendment and that individualized suspicion is required. Factory raids are highly disruptive, insulting and stigmatizing; they deeply invade a strong interest in freedom from unwarranted invasion of liberty and privacy rights; they are a less than effective means of carrying out a government interest which can be effectuated through alternative means more compatible with expectations of privacy.

Both *Martinez-Fuerte* and *Villamonte-Marquez* (as well as the border cases), which have allowed detention without individualized suspicion, have involved persons in moving vehicles where the expectation of privacy is limited. By contrast, the privacy interest in the workplace is much stronger. In *See v. City of Seattle*, 387 U.S. 541, 543 (1967), this Court stated, "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his commercial property." *See also, Gillard v. Schmidt*, 579 F.2d 825 (3d Cir. 1978). (A schoolteacher's Fourth Amendment rights were violated by an unwarranted search of her work desk.) Here, the worker's interest in being left alone is even greater, because the questioning disrupts their earning ability.

While a worker's zone of privacy at the workplace may in some ways be less strong than in the home, it is actually infringed more seriously by the type of questioning at issue here. When one is questioned in the privacy of one's home, others cannot see that the individual is being subjected to questioning, nor can they hear the individual's responses

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(Footnote continued)

appearance was the only trigger for suspicion. Under any circumstance, such a wholesale dragnet interrogation would be so disruptive and oppressive as to be unjustified by any legitimate government purposes.



(or refusal to respond) to that questioning. But, in the workplace, this is obvious and audible to everyone nearby. An individual may well prefer not to have the entire workforce know answers to such questions as "where were you born" (for example, if he was adopted and moved away from his birthplace) or "are you a citizen." While a legal alien may be required to identify himself as such to the proper government authorities, there is absolutely no reason why this status should be broadcast to his co-workers, some of whom may consider non-citizenship a mark of inferiority.

Thus, the factory raid procedures are highly intrusive of the individual's privacy. They are also highly disruptive. While the questioning of any one individual may take a few minutes, the agents are present and the exits sealed for several hours. See discussion *supra* at 4-5. During this time, work comes to a virtual standstill — understandably, since the workers are being watched by law enforcement agents the whole time — and the workers are upset and nervous for days thereafter. The foreboding possibility of a surprise raid creates tension and apprehension much of the time. The factory raid procedures thus intrude not only on the workers' privacy but on their right to earn a living and be a productive member of American society as well. The raid is thus strikingly different from the brief, regularized, unsurprising encounter approved in *Martinez-Fuerte*.

This is especially so because, unlike *Martinez-Fuerte*, the INS agents appear to have total discretion as to whom they question. As the questioning continues, it will become clear to the workers that the agents are only questioning some portion of those who look "Mexican". In effect, the raids make second-class citizens out of those who, because they look Hispanic, are subjected to unwarranted challenges to their citizenship and who must — unlike other citizens — be ready to produce proof of their citizenship when asked.<sup>10</sup>

<sup>10</sup> This country has never required its citizens to carry identification which must be produced at any time at the arbitrary behest of  
(Footnote continued on next page)



Against the highly intrusive, threatening, and insulting character of the factory raids we must balance the government interests they supposedly advance. The government claims that factory raids are an extremely effective procedure for locating and apprehending illegal aliens. Petitioners Brief at 15. Ordinarily, a court would leave these determinations to Congress. But because factory raids threaten Fourth Amendment rights (as well as Fifth Amendment rights) this Court may appropriately examine with a critical eye both the relative importance of the goal of apprehending illegal aliens and the effectiveness of factory raids in implementing it.

To begin with, it is hardly clear that the government's interest in excluding aliens is strong enough to justify the intrusions on Fourth Amendment rights caused by factory raids. As this Court noted in *Almeida-Sanchez v. U.S.*, *supra*, 413 U.S. at 273:

"The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."

At the same time, Congress has done little to deal effectively with the issue. Justice White has observed:

"The entire system . . . has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country."

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(Footnote continued)

a government official, and it is not clear that such a requirement would be constitutional. See *Brown v. Texas*, *supra*, 443 U.S. at 47 & 52 n.3.

*U.S. v. Brignoni-Ponce*, *supra*, 422 U.S. at 915 (White, J., concurring).

Congress has so far taken no such steps. Nor is it clear that illegal aliens are in fact harmful to the economy or the documented workforce.<sup>11</sup>

Whatever the interest in and importance of the general goals of the immigration laws, factory raids are hardly the irreplaceable tool the INS claims, even under the current statutory scheme.<sup>12</sup>

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<sup>11</sup> Much of the recent Congressional testimony indicates they are a benefit to the economy, filling jobs which documented workers will not perform and paying more taxes into the system than they take out in benefits. *U.S. Immigration Policy and the National Interest: Committees on the Judiciary, House of Representatives and the United States Senate, 97th Cong., 1st Sess. S. 36, 99 (1981)*.

<sup>12</sup> In its final report, a recent commission emphasized that "it is both more humane and cost effective to deter people from entering the United States than it is to locate and remove them from the interior." *U.S. Immigration Policy and the National Interest: Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy to the Congress and the President of the United States* 47 (1981). One study done for this commission estimated that Border Patrol Operations cost \$43.35 per illegal alien apprehended as opposed to a cost of \$73.55 per alien expelled as a result of INS operations in the interior. North, *Enforcing the Immigration Law: A Review of the Options* 16-17 (1980); and the same study notes that "INS has traditionally allocated a relatively slight portion of its resources to interior enforcement," *id.* at 53. Reports of the recent, highly publicized "Operation Jobs" raids in April 1982 suggest that those raids opened up few jobs for documented workers while imposing significant costs on taxpayers, workers, and employees. The INS arrested 5,440 employed aliens in nine metropolitan areas, and claimed that the project was a great success, since "the jobs referred represent \$50.6 million in annual wages." INS, *Preliminary Report on Project Jobs* 1 (1983). But the raids cost not only more than \$1 million in direct INS expenditures but also unestimated losses caused by interrupted production, workplace disruptions, and the need to hire and train new workers. And it appears that within a few days or weeks a high percentage of the apprehended aliens were back at work in the United States, many

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The INS should therefore be required to practice the same kinds of individualized investigating techniques used successfully by other law enforcement agencies. Requiring reasonable individualized suspicion would not, as the government claims, make the immigration laws unenforceable. It will merely force the INS to engage in the careful, individualized enforcement of laws it performed in *Cortez*.

This analysis is not offered to urge this Court to declare the immigration laws, or their enforcement in the interior, unconstitutional. To the contrary, the point is that the immigration laws *can* be enforced in ways far more compatible with the reasonable expectations of privacy held by documented workers. Given the low effectiveness of factory raids and the somewhat questionable priority of those raids in the scheme of government enforcement of the immigration laws, it can hardly be said that the government interests in practicing factory raids overcome the raids' highly intrusive, threatening and insulting nature. They are simply not important enough to justify stigmatizing and treading on the privacy rights of millions of citizens of Hispanic ancestry, not to mention the millions of legal aliens who are productive members of American society. A requirement of individualized suspicion is essential.

**D. The INS Had Inadequate Individualized Suspicion Of Alienage Or Illegal Alienage To Justify The Factory Raids.**

The government cites the following factors which, it contends, justified the factory raids: the garment industry is known to employ illegal aliens; several illegal alien employees had been arrested outside the Davis plant and told the INS others were employed there; when the INS entered, the plant's employees shouted "La Migra" and some hid; and, for the second Davis raid, that the first Davis raid had produced 78 formal arrests.

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*(Footnote continued)*

of the American citizens who took "referred" jobs quit them, and these jobs were taken by other illegal aliens.

Of these proffered justifications, none pointed to *any* particular person, except the fact that certain people ran or attempted to hide. A person's effort to avoid contact with law enforcement authorities is insufficient, in and of itself, to justify those authorities in detaining that person. "[r]efusal to listen or answer does not, without more, furnish . . . grounds [for detention]." *Florida v. Royer, supra*, 103 S.Ct. at 1324 (Opinion of White, J.). But even if it does, such conduct certainly does not raise a suspicion about those — such as respondents — who *do not* attempt to hide.

It is apparent, as the court of appeals held, that the INS did not have adequate grounds to suspect everyone in the factory, and thus had no grounds for detaining the entire workforce. Nor did the INS have grounds to suspect those it chose to question. Assuming the INS did have adequate grounds, based on its tips and expertise, to suspect that illegal aliens were working at Davis and Mr. Pleat, the INS could still not claim to have anything close to a reasonable suspicion that any given individual was an illegal alien. The mere presence of a person in a high-crime area "is not a basis for concluding that [that person is] engaged in criminal conduct," *Brown v. Texas, supra*, 443 U.S. at 52.

As the statement of facts demonstrates, the *only* evidence the INS gathered about any individual prior to selection for interrogation was ethnic appearance: did the person look, dress, and perhaps talk like the stereotype of the Mexican alien? As shown earlier, ethnic appearance is empirically a poor indicator. Of those who appear to be of Mexican descent, only some are aliens; and of those aliens only some are illegal. A suspicion of alienage, especially illegal alienage, based on ethnic appearance is so tenuous it cannot be considered reasonable.

This Court and lower courts have in nearly all cases rejected the use of ethnic characteristics alone to generate suspicion adequate to justify detention. In *Brignoni-Ponce*, this Court rejected the Border Patrol's claim that

the "apparent Mexican ancestry" of three occupants of a car "furnished reasonable grounds to believe that the three occupants were aliens." 422 U.S. at 886. In *U.S. v. Mallides*, 473 F.2d 859 (9th Cir. 1973), the court rejected a stop based on the observation that "Six Mexican-American appearing males were riding in a Chrysler Imperial at dusk, sitting erectly, and none turned to look at the passing patrol car." *Id.* at 861. The court stated, "Tested by any objective standard, there is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are nonwhite or because they sit up straight or because they do not look at at passing police car." *Id.*

The only case in which this Court has intimated that racial appearance might be enough of a criterion for police action is *Martinez-Fuerte*, where the Court stated that "it is constitutional to refer motorists selectively to the secondary inspection area . . . on the basis of criteria that would not sustain a roving patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation." 428 U.S. at 563. This language, however, hardly supports any effort to use ethnic appearance as a basis for a seizure outside the limited context of permanent checkpoints. The basis for this holding was that individualized suspicion was not required at checkpoints; the clear implication is that ethnic appearance does *not* create *individualized* suspicion, and is thus an impermissible basis for detention when individualized suspicion is required. The Court was also careful to note that the record supported the government's assertion that the Border Patrol was *not* relying only on ethnic appearance. 428 U.S. at 563 n.16. Finally, it stated that its holding was "confined to permanent checkpoints" and that "upon a proper showing, courts would not be powerless to prevent the misuse of checkpoints to harass those of Mexican ancestry." *Id.* at 566 n.19.

Outside the context of the permanent checkpoint, therefore, ethnic appearance is not enough to raise a suspicion that will justify detention. Factory raids thus fail to meet the Fourth Amendment's requirement of individualized suspicion.

### III.

#### **THE INS' FACTORY RAIDS VIOLATE THE EQUAL PROTECTION GUARANTEES OF THE FIFTH AMENDMENT**

The Fifth Amendment principles of equal protection of the law are clearly applicable to the procedures employed by the INS. On the basis of the record below it is evident that the racial discrimination involved in the INS factory raids is much more the heart of the constitutional matter than the unreasonable nature of the intrusions on the every day life of American citizens and legal aliens of Hispanic ancestry. The record is replete with admissions showing that absolutely no standard exists for the mass detention of an entire work force at a factory other than unsubstantial complaints based on speculation and rumor and the fact that Hispanic-looking persons are employed there, and no guidelines whatsoever are referred to in determining the particular members of that work force who are to be interrogated other than, once again, the fact that said individuals look, talk or dress consistent with the INS agent's perception of how Mexicans look, talk and dress.

#### **A. A Decision Based On The Equal Protection Guarantees Of The Fifth Amendment Is Necessary In Order To Protect Respondents As Well As Other Persons Similarly Situated.**

Whatever the application to a strictly Fourth Amendment question of the balancing or weighing of interests test enunciated by the United States Supreme Court, *see, e.g., Camara v. Municipal Court, supra*, 387 U.S. at 535-538, the

presence of a government practice based on the use of invidious racial or ethnic classifications requires that any analysis of constitutionality be made under the due process clause of the Fifth Amendment as well as the search and seizure protections of the Fourth Amendment. To do otherwise, would be to undermine the requirement that a compelling state interest be shown before an invidious racial classification can be permitted.

The foregoing discussion may be academic because, tested against the traditional Fourth Amendment balance standard, the INS procedures, to the extent based solely on the Latin ancestry of persons stopped and detained at their place of employment by roving INS patrols, *are*, per se, unreasonable. This would appear to be the purport of the Fourth Amendment cases discussed above. Were it to be held, however, that the public interest in uncovering illegal aliens outweighed the intrusion on innocent, law-abiding employees which is the clear result of the factory raid procedure, it is the position of *amici* that the factory raids, because based on invidious racial classifications, would still need to pass muster under the compelling state interest test of the Fifth and Fourteenth Amendments.

#### **B. The Constitutional Guarantee Of Equal Protection Of The Law.**

It is settled that the equal protection guarantees of the Fourteenth Amendment apply through the due process clause of the Fifth Amendment to actions by the federal government, whether legislative, executive or administrative. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 498-499 (1954). The centerpiece of the doctrine of equal protection of the law is the rule that classifications based on suspect criteria, such as racial or ethnic factors, violate equal protection unless justified by a compelling governmental interest. The suspect criteria doctrine was first enunciated by this Court in the case of *Korematsu v. United States*, 323 U.S. 214 (1944),



where the Court mandated that courts strictly scrutinize any classification based on racial characteristics, stating:

"It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are *immediately suspect*. This is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most *rigid scrutiny*. *Pressing public necessity* may sometimes justify the existence of such restrictions; racial antagonism never can." 323 U.S. at 216 (emphasis added).

Since *Korematsu*, the strict scrutiny requirement has proved fatal to every suspect classification: this Court has never again upheld an enactment which discriminated, whether on its face or as applied, on the basis of race. See L. Tribe, *A Structure For Liberty* 1000 (1978). Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Course: A Model For a Newer Equal Protection*, 86 Harv.L.Rev. 1, 8 (1972). As the Supreme Court noted in *Korematsu*:

"Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either." 323 U.S. at 218.

Even prior to the enunciation of the suspect criteria and strict scrutiny doctrine, the United States Supreme Court had acted to strike down laws which singled out minority groups for treatment different than that accorded their fellow citizens. In so doing, the Court made it clear that equal protection guarantees against invidious discrimination also extend to the administration and application of facially-neutral statutes or regulations. The landmark case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), for example, is in many ways strikingly similar to the case at bar in that it involved an enactment arguably neutral on its face but which was applied on a discriminatory basis, treating one



group of individuals different from the general population on the sole basis of race. The Court held:

"... Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution..." 118 U.S. at 373-374.

While the teaching of *Yick Wo* that neutral laws may run afoul of the Constitution by virtue of the manner in which they are applied is directly applicable to the facts at bar, the decision of the Court has an additional significance which should not be overlooked. Like the factory raids at issue herein, the enactment in *Yick Wo* lent itself to abuse by permitting such unbridled discretion on the part of the individuals charged with enforcing its terms that the application of the enactment was virtually preordained to result in discrimination. In language which is highly pertinent to the situation at bar, where INS agents are left with uncontrolled discretion to base stops and interrogations on perceptions of racial characteristics, the Court held in *Yick Wo*:

"... [The ordinances] seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons... The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." 118 U.S. at 366-367.

While *Yick Wo* involved an abuse of discretion in the administration of a public ordinance by a city licensing

board, the underlying principle has been properly held to apply to the actions of the law enforcement officials, in positions similar to the INS agents in the case at bench, in carrying out state or federal laws. See, e.g., *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 588; *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972); *United States v. Robinson*, 311 F.Supp. 1063 (W.D. Missouri 1969).

Under the standard articulated in *Yick Wo*, the primary use of racial characteristics by INS agents in deciding whom to detain and question during factory raids is clearly sufficient to trigger strict scrutiny by this Court. Under such an analysis, it is respectfully submitted that this Court cannot but conclude that the unbridled discretion given INS agents in conducting factory raids and the consequent reliance by said agents on impermissible racial and ethnic characteristics renders the factory raid, like the INS area search and the roving patrol when similarly unfettered, "fundamentally offensive to this nation's historical concepts of proper law enforcement techniques." *Marquez v. Kiley*, *supra*, 436 F.Supp. at 114.

**CONCLUSION**

For all the foregoing reasons, *amici* respectfully request that the judgment of the court of appeals be upheld.

Respectfully submitted,

MICHAEL KANTOR

*Amicus Curiae Counsel of Record,*

ALAN DIAMOND

JOHN W. COCHRANE

CARY H. THOMPSON

MANATT, PHELPS, ROTHENBERG & TUNNEY

1888 Century Park East, 21st Floor

Los Angeles, California 90067

*Attorneys for Amicus Curiae, Mexican  
American Legal Defense and Educational  
Fund, Inc. and American Jewish  
Committee*

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Attorneys for Amici gratefully acknowledge the assistance provided in the preparation of this brief by summer associates Vince Waldman and Robert Wise, students at the Stanford Law School, and by Richard Williamson, a student at the Harvard Law School.

No. 82-1271-CFX  
Status: GRANTED

Title: Immigration and Naturalization Service, et al.,  
Petitioners  
V.  
Herman Delgado, et al.

Docketed:  
January 28, 1983

Court: United States Court of Appeals  
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Fenton, Henry R., Kantor, Michael

Entry	Date	Note	Proceedings and Orders
1	Dec 17 1982		Application for extension of time to file petition and order granting same until January 28, 1983 (Pehnduist, December 20, 1982).
2	Jan 28 1983	G	Petition for writ of certiorari filed.
4	Feb 28 1983		Order extending time to file response to petition until April 2, 1983.
5	Apr 6 1983		DISTRIBUTED. April 22, 1983
6	Apr 7 1983	X	Brief of respondents Intl. Ladies' Garment, et al. in opposition filed.
7	Apr 25 1983		Petition GRANTED. *****
9	Jun 9 1983		Order extending time to file response to petition until July 9, 1983.
10	Jul 8 1983		Order further extending time to file response to petition until August 8, 1983.
11	Aug 5 1983		Joint appendix filed.
12	Aug 10 1983		Brief of petitioners filed.
14	Aug 19 1983		Order extending time to file response to petition until October 14, 1983.
15	Aug 24 1983		Record filed.
16	Aug 24 1983		Certified original record 2 C.A. proceedings, 6 volumes, received.
17	Oct 4 1983		Order further extending time to file response to petition until November 12, 1983.
18	Nov 12 1983		Brief of respondents Herman Delgado, et al. filed.
19	Nov 12 1983		Brief amicus curiae of American Civil Liberties Union filed.
20	Nov 12 1983		Brief amicus curiae of Mexican American Legal Defense and Educat. Fund, et al. filed.
21	Nov 23 1983		CIRCULATED.
22	Nov 23 1983		SET FOR ARGUMENT. Wednesday, January 11, 1984. (2nd case)
23	Dec 21 1983	X	Reply brief of petitioners INS, et al. filed.
24	Jan 11 1984		ARGUED.